

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

725
BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals
DISTRICT OF COLUMBIA

No. 9667

HARRY L. ROSENBAUM, APPELLANT

v.

CECO STEEL PRODUCTS CORPORATION, A CORPORATION, APPELLEE

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA**

GEORGE MORRIS FAY,
United States Attorney.

ROSS O'DONOGHUE,
Assistant United States Attorney.

United States Court of Appeals
for the District of Columbia

FILED MAR 19 1948

Frank W. Stewart
CLERK

TABLE OF CONTENTS

SUBJECT INDEX

	Page
Jurisdictional statement.....	1
Statement of the case.....	1
Statutes involved.....	7
Statement of points.....	8
Questions presented.....	9
Summary of argument.....	9
Argument.....	10
I. Appellant is a person "in the employ" of the appellee.....	10
A. This statute should be liberally construed.....	10
B. The language of the statute embraces more than employee.....	12
C. Legislative history indicates that a liberal interpre- tation was intended.....	13
D. The word "employee" in social legislation is given liberal interpretation.....	13
E. The common-law standards of what constitutes em- ployee are not applicable.....	16
F. The purpose of the act dictates that appellant should be afforded its protection.....	17
G. Appellant should properly be considered an em- ployee, even under common-law tests.....	19
H. There is no precise authority for present case.....	25
II. The circumstances of appellee are not so changed as to make reinstatement impossible or unreasonable.....	26
Conclusion.....	29

TABLE OF CASES

<i>Bartels v. Birmingham</i> , 332 U. S. 126; 67 S. Ct. 1547 (1947).....	19
<i>Brown v. Luster</i> —F. 2d—decided December 26, 1947, No. 11544.....	25
<i>Fishgold v. Sullivan Drydock and Repair Corporation</i> , 328 U. S. 275 (1946).....	11
<i>Frank v. Tru-Vue, Inc.</i> , 65 F. Supp. 220 (D. C., S. D. Illinois, N. D. 1946).....	25
<i>Hudspeth v. Standard Oil Company of New Jersey</i> , 74 F. Supp. 123 (U. S. D. C., W. D. Ark. 1947).....	25
<i>Kay v. General Cable Corp.</i> (C. C. A. 3rd Circ. 1944) 144 F. 2d 653... 11, 18, 28	
<i>Lee v. Remington Rand</i> , 68 F. Supp. 837 (D. C. S. C. California, C. D., 1946).....	18, 24, 25
<i>Levine v. Berman</i> , 161 F. 2d 386 (1947).....	25, 28

II

	Page
<i>McMillan v. Montecito Country Club</i> , 65 F. Supp. 240 (D. C., S. D. Cal., C. D. 1946).....	12
<i>Morgenthau v. Barrett</i> , 71 App. D. C. 148, 152, 108 F. 2d 481 (1939).....	13
<i>National Labor Relations Board v. Hearst Publications, Inc.</i> , 322 U. S. 111, 120-122 (1944).....	14
<i>Rutherford Food Corporation v. McComb</i> —U. S.—67 S. Ct. 1473, 91 L. Ed. 1350.....	19
<i>Thompson v. Standard Oil Company of New Jersey</i> (U. S. D. C., W. D. Ark. 1947).....	25
<i>United States v. Silk</i> —U. S.—91 L. Ed. 1335, 1341, 67 S. Ct. 1463 (1947).....	15, 18, 24
<i>Whitver v. Aalfs-Baker Manufacturing Company</i> , 67 F. Supp. 524 (D. C., N. D. Iowa, W. D. 1946).....	25

STATUTES

Selective Training and Service Act of Sept. 16, 1940, as amended [60 U. S. C. A. App., Sec. 308; 54 Stat. 890, 56 Stat. 724, 58 Stat. 798 and 60 Stat. 301, 341].....	1, 7, 8
Service Extension Act of 1941, as amended [50 U. S. C. A. App. Sec. 316 (b); 54 Stat. 897, 59 Stat. 166, and 60 Stat. 181, 342; 50 U. S. C. A., App. Sec. 357; 55 Stat. 627, 58 Stat. 799, and Act of Aug. 6, 1946, Chap. 936, 60 Stat.].....	8
Act of Feb. 9, 1893, 27 Stat. 435, ch. 74 § 7; Mar. 3, 1901, 31 Stat. 1225, ch. 854, § 226; Mar. 3, 1921, 41 Stat. 1312, ch. 125, § 12; Sec. 17-101, D. C. Code (1940).....	1

MISCELLANEOUS CITATIONS

The Restatement of the Law of Agency, §§ 2, 220 (1933).....	12, 16, 24
Baty, <i>Vicarious Liability</i> , 146-154 (1916).....	16
<i>The Test of Employment Relations</i> , by Gerald M. Stevens, 38 Mich. Law Review 188 (1939).....	16
<i>The Atlantic</i> , Vol. 181, No. 3, March 1948, <i>Can Lawyers Talk English</i> , by William Seagle.....	17
<i>Salesmen as Independent Contractors</i> , by Paul A. Leidy, 28 Mich. Law Review, 365 (1930).....	16, 19
<i>Independent Contractor and The Good Life</i> , by Roscoe T. Steffen, 2 University of Chicago Law Review, 501, 509 (1935).....	16, 20
Senate Hearing on Selective Training and Service Act of 1940 (S. 4146).....	13

United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9667

HARRY L. ROSENBAUM, APPELLANT

v.

CECO STEEL PRODUCTS CORPORATION, A CORPORATION, APPELLEE

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the United States District Court for the District of Columbia dismissing a petition for enforcement of veterans' rights under the provisions of Section 8 of the Selective Training and Service Act of September 16, 1940, as amended, Public Law 783, 76th Congress (54 Stat. 890, 50 U. S. C. Appendix, Section 308) as amended (56 Stat. 724) and Public Law 213, 77th Cong., as amended. The petition states that appellant left a position in the employ of the appellee for the purpose of entering the armed forces of the United States on July 20, 1942, that he served therein and received a certificate of satisfactory service, that within the prescribed time he applied to appellee for reinstatement in his position, but appellee has refused to reinstate him. This appeal is brought under the provisions of Sec. 17-101 of the District of Columbia Code (1940).

STATEMENT OF THE CASE

Appellant filed a petition under the provisions of Section 308 (e) of the Selective Training and Service Act of 1940, as amended (50 U. S. C. App. 308 (e)) to secure reinstatement in

his former position in the employ of appellee on September 5, 1946. The case was tried without a jury before Justice James M. Proctor, who, in a memorandum opinion dated March 26, 1947 (Jt. App. 103) found for the appellee holding (1) that the appellant did not qualify under the provisions of Section 8 of the Act in that he was not in the employ of the appellee but held the status of an independent contractor and (2) that if he were to be treated as an employee the appellee's circumstances have so changed as to make it unreasonable to restore him to the same or a like position. Separate findings of fact and conclusions of law were thereafter entered and the order of dismissal was entered on May 6, 1947 (Jt. App. 111).

Appellant since 1920 has been engaged in business as a manufacturer's representative with his office and headquarters at Roanoke, Virginia (Jt. App. 33). Such business has been conducted either under the style of Harry L. Rosenbaum or Harry L. Rosenbaum trading as Roanoke Engineering Sales Company, or both. On March 27, 1936, appellant under the name and style of Roanoke Engineering Sales Company and the appellee entered into a written contract under the terms of which he was appointed to act as the exclusive representative to solicit, through agents appointed by himself with the appellee's approval, orders for certain steel products of the appellee consisting principally of round bar and angle joists, in North Carolina, South Carolina and all of Virginia except certain enumerated counties (Jt. App. 89).

On September 24, 1938, appellant under the name and style of the Roanoke Engineering Sales Company by H. L. Rosenbaum entered into another written contract with appellee under which the appellant was appointed exclusive representative to solicit orders for certain other products of the appellee, consisting principally of steel windows and doors, in North Carolina, South Carolina, and portions of Virginia, West Virginia, and Tennessee (Jt. App. 91).

Each contract provided for the solicitation of such orders in these territories through agents appointed by the appellant, such appointments being subject to approval by the appellee, and also for the cancellation of the contracts by either party upon 30 days' written notice. They further provided that in the

event of cancellation by the appellee all the agencies created for the respondent by the petitioner should be cancelled at the same time and that the appellee would not renew any of the agreements with such agents within a period of 9 months from the date of such cancellation (Jt. App. 89-90, 92-93).

On May 29, 1939, the appellee suggested the elimination of West Virginia and Tennessee from the contract, but appellant refused such suggestion (Jt. App. 82-83), and on July 15, 1940, the appellee suggested the elimination of Charleston, West Virginia, from the operation of the contract of September 24, 1938, which the appellant likewise refused.

On October 28 and November 1, 1940, the appellee wrote the appellant of its intention to cancel both contracts and after further correspondence between the parties it was agreed on February 14, 1941, to eliminate West Virginia and a part of Tennessee from the contract of September 24, 1938 (Jt. App. 57, 83-85).

On July 20, 1942, appellant entered the Chemical Warfare Service, United States Army, and on August 6 and August 11, 1942, appellee wrote the appellant cancelling both contracts and at the same time cancelling the contract with the agents appointed by the appellant with the approval of the appellee (Jt. App. 101-102).

Appellant was released from service on December 20, 1945, and on December 31, 1945, made application for reinstatement to his former position, which request was denied by the appellee on January 19, 1946 (Jt. App. 43, 45).

The appellant testified that he is now District Sales Manager for three companies manufacturing fireproof doors and frames but that he does not now represent any companies manufacturing steel joists, steel windows, or screens (Jt. App. 33); that he had been a manufacturer's representative throughout the southeastern States for approximately 15 years when he entered into the contract of March 1936 with Ceco (Jt. App. 34); that this contract and the contract of September 24, 1938, provided for the appointment of subagents by him, subject to Ceco's approval, to act directly for them, and he believed Ceco accepted all of the agents he recommended, including the Roanoke Engineering Sales Company of which he was sole proprietor, and

contracts were entered into between Ceco and such agents (Jt. App. 35-36); that periodically he sent information to these agents which came to him from outside sources, and Ceco furnished them with follow-up leads and if a sale was effected a contract was entered into with Ceco and the ultimate purchaser (Jt. App. 36). He stated that Ceco always advised him when a contract was accepted and that they paid the subagent a commission, and he received an overriding commission on contracts secured by the subagents designated by him only after Ceco had received full payment (Jt. App. 37); that the company sent him names of prospective customers which he forwarded to the agent in whose territory the prospective customer was located and made a return report to the company (Jt. App. 38); that he received instructions from the company to use a certain form in making quotations and also mimeographed letters that its instructions must be followed, and these required acknowledgment to show that the instructions were understood (Jt. App. 38-40); that he also received suggestions to contact particular prospects and advise Ceco of the results of his negotiations and the company called on him to perform other services as collecting delinquent accounts, settling controversies which existed between agents and customers, and sending mechanics to adjust windows properly (Jt. App. 40); that he received a letter dated April 6, 1938, referring to certain provisions to be included in contracts, which required him to see that "all in your organization are informed on this subject and the use of this paragraph" (Jt. App. 41); and at Ceco's request he checked to see if their agent in Birmingham, Alabama, was representing a competitor (Jt. App. 41-42). He testified finally that Harry L. Rosenbaum, exclusive representative for Ceco, and the Roanoke Engineering Sales Company were separate and distinct businesses, kept separate books, and while he himself had only one employee as secretary, his company, just prior to entrance into service, had twelve regular employees and twenty-five extras on its pay roll (Jt. App. 46-47).

On cross examination he testified that while representing Ceco he was also District Manager for three other manufacturers and that is what he considered his job with Ceco (Jt. App. 47-48); that while he did not personally represent any

other companies at that time the Roanoke Engineering Sales Company was sales agent for various other companies.

Elmer T. Gustafson, Manager, Washington District, Ceco Steel Products Corporation, testified that due to the lack of office space he lived in and operated from the Hamilton and Statler Hotels from the middle of 1943 until December 20, 1945, when their present office at 2011 K Street, N. W., Washington, D. C., was opened; that the Washington office employs five salaried employees besides himself and the district includes Delaware, Maryland, District of Columbia, Virginia, North and South Carolina and a portion of West Virginia (Jt. App. 61-62); that agents in this territory are appointed by him with the company's approval and that all erection work is taken under the name of Ceco and is directly under his control and that all office expenses and salaries, including his own, are paid by Ceco (Jt. App. 62-63).

On cross examination the witness testified that his salary is a stipulated monthly salary plus a bonus based on net earnings (Jt. App. 63) and that his duties include the direction of men under him in the matter of sales and the execution of business (Jt. App. —) and that Ceco has four or five sales agents in his district (Jt. App. 63-64).

Ned A. Ochiltree, Executive Vice President of Ceco Steel Products Corporation, testified that he sent a representative to Roanoke in 1938 to see Rosenbaum and on the basis of this contract decided to enter into a contract with him for the sales of steel windows and screens (Jt. App. 64). The principal reason for this decision was that Rosenbaum "is already representing a number of manufacturers on steel building products of a similar nature to ours—not competitive, understand, but he had an immediate distribution for our metal windows in that territory and we frankly bought it in making a contract with him * * * he was just part of an agency that we bought." (Jt. App. 65.) The witness testified that Rosenbaum asked to be furnished with company stationery with his name and title as District Manager, which they refused, but did furnish him with stationery bearing his name as sales representative (Jt. App. 65); that Ceco does not have and never has had in their organization a contract like the one it had with

Rosenbaum and that its general distribution has been through branch offices with salaried employees and certain agents specializing in certain products (Jt. App. 66); that in 1942, due to the steel shortage, they discontinued manufacturing their regular products and to keep the organization intact went into war work and at that time cancelled all agency contracts throughout the country (Jt. App. 67); that by 1943 they started formulating post war plans for adding new products, changing shop methods, changing the purchasing and selling methods, decided to double the capacity of the main plant at Chicago, to add to the capacity of those in various districts and to decentralize manufacturing operations to the districts (Jt. App. 67) and that the retention of Mr. Rosenbaum did not fit in with these plans. The witness stated that the Washington district serves the same territory previously covered by Rosenbaum and some additional territory, handles more products and also handles most of the details previously handled by their Chicago office, including the furnishing of estimates, drawings, preparation of shop orders, invoicing and final collections (Jt. App. 68-69).

On cross-examination the witness admitted that the agents designated by Rosenbaum when approved by Ceco entered into contracts with Ceco (Jt. App. 74); that while the changes in 1943 contemplated very considerable expansion of their manufacturing facilities they still manufactured the same articles Rosenbaum sold (Jt. App. 74-75); that he gave them only part of his time and now their salaried employees devote full time to handling their complete line (Jt. App. 75); he admitted that the principal change in their method of doing business was the decentralization of the home office and they decided it was more to their advantage to have a full-time representative and that, with their branch office set up, is why it was impossible to employ Rosenbaum (Jt. App. 76). He stated that when Rosenbaum was representing Ceco all routine inter-office correspondence and written instructions were sent to him just as to other agents and all branch offices (Jt. App. 77); that Ben McNeeley undoubtedly advised Rosenbaum on the proper method of selling steel joists and the selling arguments in behalf of their particular products versus competitive products;

that with respect to the sale of windows the witness thought they had the right to ask him to do a specific thing, but they did not attempt to control his time or assert a schedule of work but that on a specific assignment he "did think we had the right to direct his activities" (Jt. App. 77).

STATUTES INVOLVED

The particular statutory language necessary to be construed and applied in this case appears in Section 8 (b, c, e) of the Selective Training and Service Act as follows:

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such positions, and (3) makes application for reinstatement within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period not more than one year.

* * * * *

(B) If such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * *

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces . . . and shall not be discharged from such position without cause within one year after such restoration.

* * * * *

(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the District Court of the United States for the district in which such private employer maintains

a place of business, shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. * * *

Section 8 of the Selective Training and Service Act of 1940, as amended [50 U. S. C. A., App. Sec. 308; 54 Stat. 890, 56 Stat. 724, 58 Stat. 798, and 60 Stat. 301, 341]

The reemployment benefits of Section 8, *supra*, were extended by the Service Extension Act of 1941 to "any person who shall have entered upon active military or naval service in the land or naval forces of the United States" between May 1, 1940 and the end of the war.

Section 16 (b) of said Act, as amended [50 U. S. C. A., App. Sec. 316 (b); 54 Stat. 897, 59 Stat. 166, and 60 Stat. 181, 342]

Said Section 8, *supra*, was saved from expiration on March 31, 1947, the day other sections of the Selective Training and Service Act expired, by an amendment to Section 16 (b), *supra*, which amendment prolongs the life of Section 8 indefinitely.

Section 7 of the Service Extension Act of 1941, as amended [50 U. S. C. A., App. Sec. 357; 55 Stat. 627, 58 Stat. 799, and Act of Aug. 6, 1946, Chap. 936, 60 Stat. * * *]

STATEMENT OF POINTS

1. The Court below erred in finding that appellant was not a person in the employ of the appellee.
2. The Court below erred in finding that independent contractors were necessarily excluded from the benefits of the reemployment provisions of the Act.
3. The Court below erred in finding that appellant was an independent contractor.
4. The Court below erred in finding that appellee's situation had so changed as to make unreasonable the reinstatement of appellant.

QUESTIONS PRESENTED

1. Whether a sales representative of a corporation which had the right to discharge him upon thirty days' notice and which exercised control over his activities in many particulars, who left his position with the corporation to serve in the army during the war and who made seasonable application for reinstatement upon his honorable discharge, is entitled to reinstatement in his former position as a person "in the employ" of the corporation under the provisions of the Selective Service Training and Service Act of 1940.

2. Whether the circumstances of the corporation have so changed as to make it unreasonable or impossible to reemploy such a man when the only change in their circumstances appears to be a decentralization of their organization because of the vastly increased volume of business which to a great extent was brought about by the man's own effort.

SUMMARY OF ARGUMENT

The appellant, formerly a sales representative of appellee, seeks the protection of the Selective Training and Service Act which provides for compulsory reinstatement of those persons who left a position in the employ of another to serve in the armed forces where the circumstances of the employer had not so changed as to make the reinstatement impossible or unreasonable.

The term "employee" has been given a much broader scope by the Supreme Court in the interpretation of social legislation than the common law gave the word. A larger class is defined by the term in social legislation than embraced in its common-law definition. The term deliberately employed by Congress in this legislation, person "in the employ" defines an even larger class, especially when considered in conjunction with the spirit and purposes of this Act which is intended to facilitate the return of veterans to civilian life.

Accordingly, it is submitted that the Court below erred in holding that, because it considered appellant an independent contractor as determined by common-law tests, he was not entitled to the protection of the Act. There is nothing in the law that makes such a narrow class as common-law employees

the sole beneficiaries of its provisions, and indeed there is every reason to hold that many others must be entitled to its protection.

But, even if a narrow construction is used, appellant should be found to have been an employee of the appellee. Close control was exercised over appellant's activities by appellee and it had the right to discharge him on short notice. Besides qualifying under these fundamental criteria of the employer-employee relationship, appellant meets many of the other less-conclusive tests of what constitutes an employee. Accordingly, the Court below was in error in holding that appellant was an independent contractor.

The changes in the circumstances of appellee are principally in the decentralization of its activities because of greatly increased sales, which increase was substantially contributed to by appellant's industry. The same products are sold in the same territory that was formerly covered by the appellant. Appellee now considers a permanent local office necessary where it had practically no business when appellant first began to represent the company. Such a change in circumstances is surely not such as to render the reinstatement of appellant either impossible or unreasonable in the contemplation of the Act.

ARGUMENT

I. Appellant is a person "in the employ" of the appellee

Appellant was a person "in the employ" of the appellee at the time he went into the military service. The court below was in error in holding that if the appellant was an independent contractor he was necessarily excluded from the benefits of the Act and also in holding that appellant was an independent contractor rather than an employee of appellee.

A. *This statute should be liberally construed.*—In determining what persons are to be included within the protection of this Act, a liberal interpretation should be given to all of its terms in order to effectuate its purposes.

The portion of the statute involved in this case was designed to anticipate and provide a remedy for the serious dislocation that would confront the veteran returning from military service. Though originally enacted before this country went to

war, its provisions were broad enough to protect both the man called up from his work for a year's military training in preparation for war, as well as the soldier who fought for his country through many battles. Both were to be given the assurance that upon their return to civil life their old positions would be open to them.

Indeed the fact that war occurred makes it necessary to interpret this Act in the light of the fact that most of the persons seeking reinstatement in their former positions are veterans who fought for the very survival of this country. Consequently, justice demands that the construction most favorable to the returning soldier be put upon the various sections of the Act in order that men so deserving of their country may return with the minimum of sacrifice to the positions they occupied before going to their country's defense. The Supreme Court has recognized the propriety of a liberal construction of this Act and in *Fishgold v. Sullivan Drydock and Repair Corporation*, 328 U. S. 275 (1946) at page 285, said:

This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. * * * Our problem is to construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permit.

The Third Circuit Court of Appeals expressed the same sentiment in *Kay v. General Cable Corp.* (C. C. A. 3d Circ. 1944) 144 F. 2d 653, when it said:

Every consideration of fairness and justice makes it imperative that the Statute should be construed as liberally as possible so that military service should entail no greater setback in the private pursuit or career of the returning soldier than is unavoidable. The question here presented, therefore, is not to be solved by the application of abstract tests or formulae; but the factors which usually determine the nature of a disputed relationship must be considered in the light of the purpose which Congress intended to accomplish.

B. *The language of the Statute embraces more than employee.*—The most important issue in this case is the interpretation of the words in the Act of "position in the employ." The real question is whether the appellant as a sales representative of the appellee comes within the scope of this provision, for if he does, he is entitled to the relief he asks. Giving the interpretation to this phrase that would best effectuate the purposes of this Act would result in the appellant's being within the category. The words of the Act do not provide simply that an employee shall be returned to his former status but significantly says "a person in the employ of a private employer shall be reinstated." The District Court Judge, Yankwich, in *McMillan v. Montecito Country Club*, 65 F. Supp. 240 (D. C., S. D. Cal., C. D. 1946) said:

To me, the phrase "position * * * in the employ of any employer" means more than the word "employee." I think it covers employee, but includes many more relations which could not be encompassed within the orthodox definition of the word employee."

* * * * *

The state of the law at the present time is such that we can safely say that the only fundamental difference between the two lies in control. An independent contractor is employed to perform certain specific work. He has absolute control over the manner of performing it, and is accountable to the other contracting party only for the result. However, a person occupying a position in the employ of another is one whose actions are under the control of an employer. See Restatement of Agency, §§ 2, 220. Neither the manner of payment of wages nor the fact that a good deal of independence may be allowed in the employment is an absolute criterion in determining whether a person is or is not in the employ of another. And a person may be held to be in the employ of another, although, while performing certain services for the employer, he also performs services for himself, thus occupying a dual role.

This very Court has given a much wider scope to the term "in the employ" than mere employee in the interpretation of another statute. In *Morgenthau v. Barrett*, 71 App. D. C. 148, 152, 108 F. 2d 481 (1939), this Court held that a retired army officer could not practice before the Treasury since the statute barred an officer *in the employ* of the United States, saying:

"* * * Undoubtedly, the ordinary meaning of 'employ' is * * * to make use of * * * to keep at work * * * to entrust with some duty. The status of a retired officer, it may very well be said, does not fit into this definition. Unless recalled to active service with his own consent, his relationship to the government is more accurately that of pensioner than employee. But the contrary view has prevailed and has guided the administrative practice for more than a quarter of a century. * * * We must hold, therefore, that petitioner is an officer in the employ of the United States within the spirit and intent of the statute. * * *"

C. *Legislative history indicates that a liberal interpretation was intended.*—It is significant, too, that the legislative history of this Act shows that when the bill was under consideration by the Senate Committee, the first drafts of the bill declared as the purpose and intent of the Congress "that every man who is called from a job when inducted for training and service and who receives such a certificate and is in sound physical and mental condition ought to be reemployed in such job;" (Senate Hearing on Selective Training and Service Act of 1940 (S. 4146) page 291) whereas in the subsequent drafts and in the Act as finally enacted, the words "in the employ" were used. It may well be that the term "in the employ" was deliberately used because of the broad interpretation that it had received administratively and judicially.

D. *The word "employee" in social legislation is given liberal interpretation.*—However, even if the words "person in the employ" should be considered synonymous with "employee," recent decisions of the Supreme Court make it clear that in

social legislation the word "employee" is to be given a meaning which embraces many more persons than are included in the narrow, common-law definition of the term. In the case of *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U. S. 111, 120-122 (1944), the Court insisted that the term "employ" should have a broad meaning and in that case held that newsboys not meeting the old common-law standards of employees were nonetheless employees within the provisions of the Wagner Act and as such had a right to bargain collectively with their employer. Speaking through Mr. Justice Rutledge, the Court said:

The principal question is whether the newsboys are "employees." Because Congress did not explicitly define the term, respondent says its meaning must be determined by reference to common-law standards. In their view "common-law standards" are those the courts have applied in distinguishing between "employees" and "independent contractors" when working out various problems unrelated to the Wagner Act's purposes and provisions.

The argument assumes that there is some simple uniform and easily applicable test which the courts have used, in dealing with such problems, to determine whether persons doing work for others fall in one class or the other. Unfortunately this is not true. Only by a long and tortuous history was the simple formulation worked out which has been stated most frequently as "the test" for deciding whether one who hires another is responsible in tort for his wrongdoing. But this formula has been by no means exclusively controlling in the solution of other problems. And its simplicity has been illusory because it is more largely simplicity of formulation than of application. Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing. This is true within the limited field

of determining vicarious liability in tort. It becomes more so when the field is expanded to include all of the possible applications of the distinction.

It is hardly necessary to stress particular instances of these variations or to emphasize that they have arisen principally, first, in the struggle of the courts to work out common-law liabilities where the legislature has given no guides for judgment, more recently also under statutes which have posed the same problem for solution in the light of the enactment's particular terms and purposes. It is enough to point out that, with reference to an identical problem, results may be contrary over a very considerable region of doubt in applying the distinction, depending upon the state or jurisdiction. A person who, for instance, is held to be an "independent contractor" for the purpose of imposing vicarious liability in tort may be an "employee" for the purpose of particular legislation, such as unemployment compensation. * * * In short, the assumed simplicity and uniformity, resulting from application of "common-law standards," does not exist.

And again, quite recently, in interpreting the provisions of the Social Security Act in *United States v. Silk*, the Supreme Court declared that the purpose of the legislation should not be defeated by a narrow construction of the term "employee," saying:

As the federal social security legislation is an attack on recognized evils in our national economy, a constricted interpretation of the phrasing by the courts would not comport with its purpose. Such an interpretation would only make for a continuance, to a considerable degree, of the difficulties for which the remedy was devised and would invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation. These considerations have heretofore guided our construction of the Act.—U. S.—91 L. Ed. 1335, 1341, 67 S. Ct. 1463 (1947).

Certainly, in the interpretation of an act with the purposes of the present Act, at least as broad a construction should be put upon the word "employee" as in any of the social legislation in which it has been so liberally construed.

E. *The common-law standards of what constitutes employee are not applicable.*—It seems only reasonable that the old standards for determining the distinction between an employee and an independent contractor should not be applied here. In the first place, the drawing of the line between employees and independent contractors was devised for specific purposes with which this Act is not concerned. They grew up in the attempt to determine and limit the tort liability of employers. The distinction usually made between an employee and independent contractor or entrepreneur is often determined by the so-called "control" tests and involves the power of the employer not only to direct what work the servant is to do, but also the manner in which the work is to be done. *The Agency Restatement*, Section 220 (1933) lays down a number of considerations for determining whether or not the control necessary for the employer-employee relationship exists. This rule of control has been much criticized. It has been called "unjust," "illogical" and concerning it, it has been said:

Unknown to the classical jurisprudence of Rome, unfamiliar to the medieval jurisprudence of England; it has attained its luxuriant growth through carelessness and false analogy. Baty, *Vicarious Liability*, 146-154 (1916).

At best the existence of the relationship is exceedingly difficult to determine. As stated by Roscoe T. Steffen in *Independent Contractor and The Good Life*, 2 *University of Chicago Law Review*, 501, 509 (1935):

Though a gallant effort, the principle success of the entrepreneur test lay in showing how hopelessly unworkable is the scientific method as a basis of decision in law; "earmarks" are not fixed quantities nor even so can their weight in consequence be assumed for all time.¹

¹ See also "The Test of Employment Relations" by Gerald M. Stevens, 38 Mich. Law Review 188 (1939) and "Salesmen as Independent Contractors" by Paul A. Leidy, 28 Mich. Law Review, 365 (1930).

The difficulty of determining the relationship has very recently been adverted to in an article in *The Atlantic*, Vol. 181 No. 3, March 1948 entitled *Can Lawyers Talk English?* by William Seagle. Mr. Seagle says:

An even better example is to be found in the social legislation involving the relationship between employer and employee. The emotional element of this relationship has been preserved by statutory definition in a variety of situations in which it no longer really has any meaning. The term "employee" has become the most kaleidoscopic in the whole realm of statutory English. An individual may not be an "employee" but an independent contractor, in an accident suit. He may nevertheless be an employee for the purposes of unemployment insurance or minimum wage legislation. Again, he may not be an employee for such purposes but may be an employee for the purposes of a labor relations act. Furloughed employees are still employees under the Railway Labor Act of the purpose of voting in collective bargaining elections.

The conception of the employer-employee relationship has become so complex that some legislatures have practically given up and have indulged in pseudo-definitions, which define "employee" as "one who works for an employer in an employment." In the statutory lexicon, an employee is now generally one who renders service to another in any capacity for remuneration. Vendor and vendee, lessor and lessee, bailor and bailee, principal and agent relationships, have been defined as employer-employee relationships.

F. *The purpose of the Act dictates that appellant should be afforded its protection.*—Not only are the old distinctions between employee and independent contractor difficult to determine, but there is no reason why such rules should be applied when it is considered that this statute should be interpreted in the light of the evils that it is intended to remedy. The purpose of this Act is not to determine tort liability but to assure the reestablishment of the veteran in his old position and to enable him to take up the threads of his old life without

penalty. It is just as much within the purpose of this Act to protect one who might not come within the strict common-law definition of servant as it is to protect those within the scope of a strict definition. A sales representative who was a vital link in the distribution of appellee's products is as needful of the protection of the Act and as deserving of his former principal as any other employee. If anything, a man with appellant's specialized talents and peculiar usefulness because of his particular connections would have a more difficult time reestablishing himself in civilian life than a mere artisan or common laborer who would as readily fit into one company as in another.

It is by no means certain that the Act was intended to exclude every member of the class of common-law independent contractor. It is true that a dictum in the *Kay* case, *supra*, states that "Of course, the words are not applicable to independent contractors," but it should not be overlooked that in that case the relief sought was granted. There a physician who was employed by the corporation for three hours a day and who was on call at other times and who had, in addition, a private practice of his own, was held to be "in the employ" within the meaning of this Act.

Furthermore, the Court there said that "Except for casual or temporary workers, who are expressly excluded, they [the words "in the employ"] cover almost every other kind of relationship in which one person renders regular and continuing service to another." And in addition to the *Silk* case, *supra*, the Supreme Court elsewhere has rejected the common-law concept of control, the usual distinction between employee and independent contractor, saying:

In the *United States v. Silk* * * * we held
 * * * that the relationship of employer-employee
 * * * was not to be determined solely by the idea
 of control which an alleged employer may or could
 exercise over the details of the service rendered to his
 business by the worker or workers. Obviously, control
 is characteristically associated with the employer-
 employee relationship, but in the application of social
 security legislation employees are those who, as a matter

of economic reality, are dependent upon the business to which they render service." *Bartels v. Birmingham*, 332 U. S. 126, 67 S. Ct. 1547 (1947).

See also *Rutherford Food Corporation v. McComb*—U. S.—67 S. Ct. 1473, 91 L. Ed. 1350.

As a matter of fact, at least one court, in a case very similar to this, of a salesman on a commission under a contract which expressly called him an "independent contractor" rejected this label as "unrealistic" and held that the salesman came within the provisions of the Act, stressing the fact that the employer had effective control over the salesman and that it had the right to terminate the contract at will. *Lee v. Remington Rand*, 68 F. Supp. 837 D. C. S. D. California, C. D. 1946. Consequently, the appellee here should not be allowed to dismiss appellant, and he should not be denied recourse to the benefits provided by the Act.

G. *Appellant should properly be considered an employee, even under common-law tests.*—Even though the coverage of the Act should be given a broad enough interpretation to cover those who are not strictly employees according to common-law standards, nevertheless it will be found that appellant meets many of even those strict criteria of the common law. The most commonly applied test of the employer-employee relationship is whether the employer had the right to control the employee's activity and methods and was not merely concerned with the results. As stated by Paul A. Leidy in "Salesmen as Independent Contractors," 28 *Michigan Law Review* 365:

In determining whether or not the relationship between the defendant and a careless third person whose negligence has resulted in injury to the plaintiff, is, on the one hand, that of master and servant, or principal and agent, or on the other hand, that of independent contracting parties, the so-called "control test" is almost universally applied. The most recent authoritative commendation of this test is found in the American Law Institute Restatement of the Law of Agency, where an independent contractor is described and his characteristics defined in the following manner:

"An independent contractor is a person who undertakes to execute certain work or to accomplish a stipu-

lated result for another, under such circumstances that the right of control of the doing of the work, and of the forces and agencies employed in doing it, is in the contractor.

"The characteristics of the independent contractor are that he is a person (usually carrying on a distinct occupation) who for a stipulated compensation (usually a lump sum) undertakes to do a piece of work (usually of some magnitude) by his own forces and instrumentalities (usually supplying labor and material) being responsible to his employer for the stipulated result but (*essential characteristic*) being left in control of the operation of the forces and instrumentalities by which the stipulated result is to be accomplished."

Roscoe T. Steffen in his article entitled the "Independent Contractor and the Good Life," 2 *Univer. of Chicago Law Review* 501, practically states the same thing on page 502:

The description, worn smooth from much use through the years, runs in terms of "control," a person who undertakes to complete a specified job according to his own methods and without being subject to the control of his employer as to the means of doing the work is an independent contractor. If he is engaged in a special calling as well, and is paid a lump sum for the job, identification is said to be quite positive. Conversely, where the work is done *subject to the employer's control*, or "right to control," both the thing done and the manner of doing it, the contractor becomes with equal certainty a "servant." Such is the law in broad round phrases * * *.

There was considerably more control of the appellant here by the appellee than is consonant with the notion of an entrepreneurial relationship. The appellant was not simply expected to obtain results without any control of his activities or methods. The contract, which is the basis of the whole relationship, provides for control of appellant's method of doing business as the following excerpts show:

It is understood that in no case will you or any of your agents have the authority to accept an order or make a

contract in our behalf without first obtaining our complete approval, and no order or contract made by you or your agents shall be binding upon us unless acceptance of such orders or contracts is given in writing by a duly authorized officer of our company.

* * * * *

You are to diligently pursue the promotion and sale of the Ceco products listed herein, securing necessary agencies subject to our approval and generally arrange adequate sales representation for us in the territory assigned to you. We are to furnish such catalogs, price lists, samples and other advertising literature as we may have available and generally assist you in the promotion and sale of these products in your exclusive territory (Jt. App. 92-93).

The testimony of the Executive Vice President of the Ceco Steel Products Corporation, Mr. Ned A. Ochiltree, indicates that the company considered that it had the right to control appellant's methods and did in fact control them in many respects. When asked if Ceco ever exercised any control over Mr. Rosenbaum or otherwise directed his method or manner of doing business with respect to the products of Ceco, he replied (Jt. App. 77):

A. I am sure that our various division managers, particularly Ben MacNeely, in talking with Mr. Rosenbaum undoubtedly advised him on the proper method of selling steel joists and the selling arguments in behalf of our particular products versus competitive products. I do not know how much we may have done on windows on that score; I doubt very much because windows are more of a staple commodity.

Q. Did you consider, under your window contract, which is the one you are most familiar with, that you had a right to control the activities of Mr. Rosenbaum?

A. With respect to the sale of windows, I think we had the right to ask Mr. Rosenbaum to do a specific thing for us, and I am sure Mr. Rosenbaum would have done it; but we did not attempt to control his time or assert a schedule of work.

Q. Did you consider that you retained the right to direct his activities with respect to the sale of windows?

A. On a specific assignment, I would think we would have that right with any agent.

Furthermore, it was brought out that the regular company bulletins outlining the policy of the company and containing instructions for the handling of the corporation's business were regularly sent to the appellant for his guidance (Jt. App. 77). In addition, appellant was at times ordered by the company to investigate reports of competitors' success (Jt. App. 41-42); to contact certain prospects and aid in the collection of money owing to the corporation (Jt. App. 40). Correspondence between appellant and appellee demonstrated appellee's strict insistence that its prescribed methods of representation be followed by the appellant. For example, in one letter of their instructions is found:

These instructions *must* be definite and *must* be followed one hundred percent. If you have any questions to ask, kindly advise us now so that there will be no misunderstanding in the future.

Will you please acknowledge receipt of this letter so we will know you understand how this is to be handled (Jt. App. 39-40).

The company was by no means reluctant to insist that their instructions be carried out to the letter, as is evidenced by the following communication (Jt. App. 78-79):

CHICAGO, ILLINOIS, *July 6, 1936.*

Mr. H. L. ROSENBAUM,
State and City Bank Building,
Roanoke, Virginia.

DEAR HARRY: For some reason or other, you have forsaken the understanding which we have had with reference to the handling of our business.

First, it was distinctly understood that all contracts would be taken in our name and on our form of contract. Second, it was understood that we would have the approval or refusal of the credit before any orders would be accepted.

For a time, your orders were handled in this manner. However, we slipped through a couple of small orders such as the one from Barbour and Sons, and the long-span joists on the Wythe Building Corporation, without insisting on these regulations being adhered to.

However, I find now you are sending us two very good sized orders wherein our form of contract was not used, namely, the Mountain Hotel and Sugar Grove School. I have written you regarding our requirements on these and trust that you will comply with our request.

We now have the order for the Armory Building at Charlottesville, wherein you have quoted direct in your own name, and to make matters worse, the job is at such a price that we have no desire to fill it. We have absolutely no credit information on yourself or the Roanoke Engineering Sales Company in particular, in whose name this contract was taken. It becomes necessary therefore that you inform us in just what manner you intend handling this transaction to assure us of receiving payment, so that our credit department will have something to guide them in passing the acceptance of this order.

I have repeatedly asked that a copy of all estimates and quotations by you in our name be furnished to us in time so that we can have a check on same, and also to guide us in deciding whether we wish the business at competitive prices or not.

To sum up, you have agreed to do the following: First, furnish us with all copies of estimates and quotations when they are made; second, that all estimates and quotations shall be on the basis of our published prices; third, that all quotations and orders shall be on our contract form; fourth, that before deviating from our published prices, you are to have our approval.

It is absolutely necessary if we are to continue our present relations that these agreements be adhered to.

Very truly yours,

CONCRETE ENGINEERING COMPANY,
BEN MACNEELY,

Manager, Steel Joist Division.

Of course, the company did not control directly the schedule, the hours and the itineraries of appellant, but it is not usual for a corporation strictly to control the hours of their superior employees. It is not customary for the employer to control precisely the hours or the itinerary of their salesmen, and it is of no significance to the existence of the employer-employee relationship here that such picayune controls were not exercised in dealing with a man of the calibre and position of appellant. The important fact is that strict control was exercised over his method of representing the Ceco Corporation in every detail that they considered important. It is evident that they considered that they had a right to control his method and did, in fact, exercise that right when it was to their interests so to do.

It is generally considered too that an important element in determining the existence of the employer-employee relationship is the right to terminate the relationship at any time. *Lee v. Remington-Rand*, 68 F. Supp. 837. This, under the provisions of the contract, the appellee had a right to do (Jt. App. 90, 93). It is true that a 30-day written notice was required, but the provision for notice in contracts of employment is by no means inconsistent with the right to "fire."

Another test of the employer-employee relationship is the right to control subordinates. Agency Restatement §§ 2, 220. While it is true, of course, that appellant controlled his own employees in his own company which was concerned with actual construction work, yet the appellee retained strict control of his subordinates within his sales organization, insisting that their appointments be approved by it, making contracts directly with these agents while dealing with them and exercising control over them in many respects (Jt. App. 89, 90-91, 92-93).

The Supreme Court in *U. S. v. Silk*, *supra*, listed some of the things that an employee is not, which is of great assistance in determining what an employee is:

Of course, this does not mean that all who render service to an industry are employees. * * * Obviously the private contractor who undertakes to build at a fixed price or on cost-plus a new plant on specifications is not an employee of the industry thus served nor are his employees. The distributor who undertakes to market at

his own risk the product of another, or the producer who agrees so to manufacture for another ordinarily cannot be said to have the employer-employee relationship. Production and distribution are different segments of business.

It is significant that the exceptions to the term "employee" there listed do not include persons in the status of appellant, for he acted merely as agent of appellee in the marketing of their product and did not market it at his own risk. They were the owners until it was paid for by the ultimate purchaser. He was merely a cog in the distribution machinery of the Ceco Corporation.

H. *There is no precise authority for present case.*—The courts have dealt with cases similar to the present one in the application of this Act, with varying results. The Ninth Circuit Court of Appeals has recently decided that a salesman on commission was not entitled to reinstatement under the provisions of this Act on the theory that he was an independent contractor and that as such was not within the scope of the statute. *Brown v. Luster*, — F. 2d — Decided December 26, 1947, No. 11544. However, the Seventh Circuit Court of Appeals in *Levine v. Berman*, 161 F. 2d 386 (1947) held that a salesman was entitled, under the provisions of the Act, to a restoration to his old territory. To the same effect is *Whitver v. Aalfs-Baker Manufacturing Company*, 67 F. Supp. 524 (D. C., N. D. Iowa, W. D. 1946). See also *Lee v. Remington Rand*, 68 F. Supp. 837 (D. C., S. D. California, C. D. 1946).

There are several District Court cases in which reinstatement was not ordered in cases involving salesmen. In *Frank v. Tru-Vue, Inc.*, 65 F. Supp. 220 (D. C., S. D. Illinois, N. D. 1946) the salesman had made it clear that he did not consider himself an employee of the company and that the accounts were his and not the company's. Furthermore, he had made threats to ruin the respondent's business which caused the court to conclude that it would be unreasonable to compel his reemployment.

While in *Hudspeth v. Standard Oil Company of New Jersey*, 74 F. Supp. 123 (U. S. D. C., W. D. Ark. 1947); *Thompson v. Standard Oil Company of New Jersey* (U. S. D. C., W. D. Ark.

1947), the facts more clearly showed that the veterans were independent contractors.

II. The circumstances of appellee are not so changed as to make reinstatement impossible or unreasonable

The court below found that appellant was not entitled to the restoration to his old position because "the circumstances of respondent have so changed since July 20, 1942, and prior to December 31, 1945, as to make it unreasonable for respondent company to reinstate petitioner." The Act provides for restoration "unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so." Section 308.

In determining whether the employer's circumstances have so changed as to make it impossible or unreasonable to reinstate appellant, the history of their relations should be considered. Appellant first acted as a manufacturer's representative in 1920 (Jt. App. 33). From that time on he acted for various manufacturers of building products throughout the Southeastern portion of the United States. (Jt. App. 33-34.) He built up a wide acquaintance among contractors, architects and others interested in obtaining building products. This intimate knowledge of building products, the requirements of the contractors and architects, as well as the friendship and acquaintance of appellant with those who might use their products was known to the officers of the appellee corporation. Having very little business in that section of the country, they sought out the appellant in 1936 and asked him to represent the corporation in that area in the marketing of certain of their products. Subsequently the number and variety of their steel manufactures which he sold for them were increased by later contract. (Jt. App. 92) On their behalf and with their approval he appointed a number of agents for the appellee who acted under his supervision but who promoted the sales of appellee's product throughout North and South Carolina, most of Virginia, and parts of West Virginia and Tennessee. Although there were some complaints about the volume of business produced (Jt. App. 65-66) and the expense of effecting sales, this relationship continued to the evident satisfaction of both parties until this country became

involved in war. As a manufacturer of steel products, the appellee was immediately able to obtain large Government contracts and was unable to obtain steel for its usual peacetime products. (Jt. App. 66) Since the demand for its goods was so much greater than its ability to supply them, it found it no longer necessary to pay salesmen to devote their time to the promotion and distribution of their products. (Jt. App. 67)

By the elimination of sales agents, the corporation's profit was increased by the amount of the commission. When this situation arose, appellee immediately showed its desire to eliminate appellant from the distribution picture. Immediately after Pearl Harbor appellant indicated his intention of trying to get into the armed services. (Jt. App. 43) On July 20, 1942, he received a commission in the United States Army and immediately thereafter notified appellee of this fact. On August 6, 1942, seizing the opportunity to terminate this now unprofitable connection, appellee formally notified appellant of its intention to terminate the contract but indicated its intention and desire to resume the sales connection upon the termination of the war. In the course of the war appellee found it profitable to establish an office in Washington, the ultimate source of all Government contracts, and has maintained an office here since that time. (Jt. App. 61) This office is headquarters for a territory that includes all of appellant's old area, as well as the Virginia counties that were omitted from his territory, and, in addition, the District of Columbia, Maryland, and Delaware. (Jt. App. 62) The District Manager in charge of this area is a full-time employee of the appellee and receives a commission as well as a percentage, based on net business. (Jt. App. 63) There is testimony to the effect that the sales of appellee's products are now handled differently through this local office. The mechanics of handling a sale are somewhat different from what they were during the establishment of this office, and more products are handled than were handled by the appellant. (Jt. App. 70) However, no facts were adduced to show that the appellee's position is so changed as to make impossible or unreasonable the reemployment of appellant.

The appellee is still manufacturing essentially the same products that it did before the war. It is still necessary to sell them, and they are being sold throughout the area that appellant formerly covered. It is undoubtedly true that owing to the present shortage of steel, the selling job is by no means difficult, and the appellee is naturally reluctant to share its profits from the sales with agents. Furthermore, if the present volume of sales is so great as to require a local office and a staff in this city to handle the distribution of its products in this area, it is largely owing to the efforts of appellant that this situation exists. When he first represented the corporation, they were doing very little business throughout the Southeastern part of the United States but now the volume of such business is considerable.

It was his efforts, together with the efforts of his comrades in arms, that made possible the prosperity and security that appellee enjoys today. As the Seventh Circuit Court of Appeals said in *Levine v. Berman, supra*:

When the petitioner returned from service with an honorable discharge and his service with that of other men had won a war that had made it possible for the respondent to prosper so abundantly, we do not see on this record how it would have been unreasonable or impossible for the respondent to restore the petitioner at his old commission.

The appellant should be permitted to share in the profits of this increased business, rather than have it used as an excuse for the change in the method of handling it, which appellee contends makes it unreasonable for the corporation to be required to reinstate the appellant.

This, as well as every other portion of the Act, should be construed liberally so as to protect the rights of the returning veteran. As was said in *Kay v. General Cable Corporation, supra*, at page 655-6:

Accepting the defendant's contention that there would be some loss of efficiency and possibly some additional expense involved, more than that is needed to justify refusal to reinstate a person within the protection of the

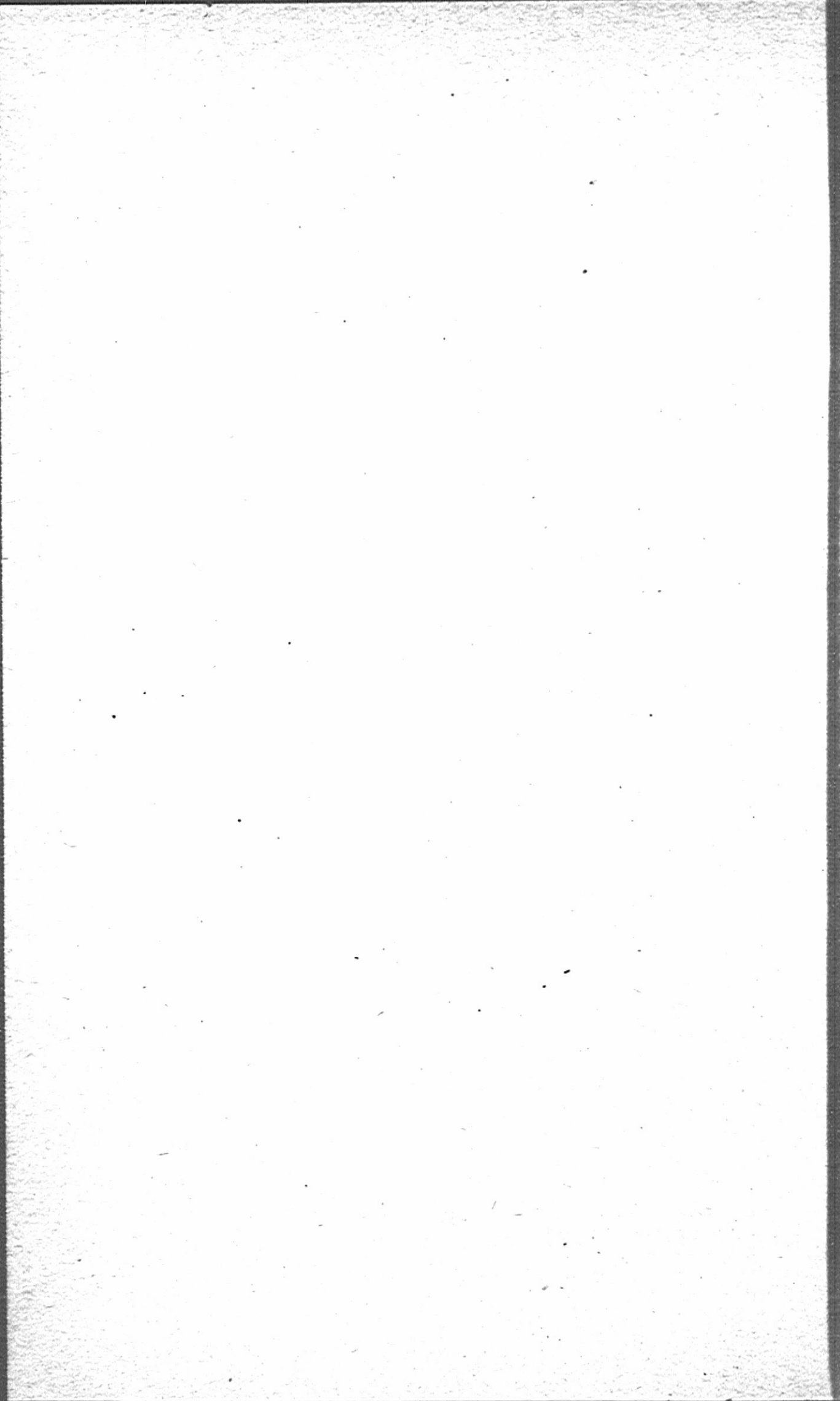
Act. In most cases it is possible to give some reason for the refusal. "Unreasonable" means more than inconvenient or undesirable. The defendant's argument upon this point, if carried to its necessary conclusion, would defeat the main purpose of the Act and limit its operation to merely capricious or arbitrary refusals. Men and women returning from military service find themselves, in countless cases, in competition for jobs with persons who have been filling them in their absence. Handicapped, as they are bound to be by prolonged absence, such competition is not part of a fair and just system, and the intention was to eliminate it as far as possible.

CONCLUSION

To sum up, the only real change in the appellee's business is that there has been a considerable increase since 1942, and it is now being handled in a way to assure greater profits to the corporation under present circumstances where demand exceeds supply. The same products are being distributed in the same territory formerly held by the appellant. It is neither impossible nor unreasonable to restore him to the position he formerly held or one equal or superior to it. No subtle distinctions should be made in the interpretation of statutes of this kind when it is clear that a man has given up his livelihood to enter the Army in time of war, and every principle of equity and justice requires that he be reinstated.

GEORGE MORRIS FAY,
United States Attorney.

ROSS O'DONOGHUE,
Assistant United States Attorney.



JOINT APPENDIX

INDEX TO JOINT APPENDIX

Transcript of Testimony.....		Page 1
<i>Name of witness</i>	<i>Direct</i>	<i>Cross</i>
<i>Redirect</i>	<i>Recross</i>	
Harry L. Rosenbaum.....	1	47
Elmer T. Gustafson.....	61	63
Ned A. Ochiltree.....	64	74
		79
		80
Petition.....		86
Contract of March 27, 1938.....		89
Form of Contract with Subagents.....		90
Contract of September 24, 1938.....		91
Answer to Respondent.....		94
Stipulation of Certain Facts.....		98
Letters Cancelling Contracts.....		101
Letter Acknowledging Termination.....		102
Memorandum Opinion with Justice Proctor.....		103
Findings of Fact and Conclusions of Law.....		103
Judgment Dismissing Complaint.....		111

1 In the District Court of the United States for the
District of Columbia

Civil Action No. 36622

HARRY L. ROSENBAUM, PETITIONER

v.

CECO STEEL PRODUCTS CORPORATION, A CORPORATION, FORMERLY
CONCRETE ENGINEERING COMPANY, A CORPORATION,
RESPONDENT

Filed Nov. 6, 1947. Harry M. Hull, Clerk.

18 HARRY L. ROSENBAUM

DIRECT EXAMINATION

Q. Your name is Harry L. Rosenbaum?

A. Yes.

Q. What business are you engaged in, Mr. Rosenbaum?

A. I am district sales manager for three companies that
manufacture doors for fireproof buildings.

19 Q. How long have you been engaged in the business
of manufacturer's representative?

A. Since 1920.

Q. Where were you engaged in that business?

A. I have always lived in Roanoke, and I have operated out
of Roanoke ever since.

Q. What territories do you generally cover?

A. What we call the Southeastern States, consisting of the
two Carolinas, the State of Virginia, a portion of West Virginia,
and a portion of Tennessee.

Q. Describe briefly what your duties are as manufacturer's
representative.

A. Well, my job is to go out into the territory, and after seeing architects, contractors, banks, chambers of commerce, and so forth, decide who is the logical and best representative to recommend to the manufacturer. Then, when I have recommended that agent as the best representative for the manufacturer, the manufacturer can appoint him as agent; 20 or if they differ with my opinion, they so state.

* * * *

Q. Your first contact with Ceco was entered into in March 1936. You were engaged in the business of manufacturer's representative for a period of some ten or fifteen years prior to that time, were you not?

A. Yes.

* * * *

22 Q. When was it that you first heard from Mr. MacNeely?

A. In the early thirties.

Q. In the early 1930's?

A. Yes.

Q. Go ahead and state that.

A. Mr. Ben MacNeely, who was then in charge of the steel joist division of Ceco Steel Products Corporation, gave us a contract—gave me a contract—to cover the territory for him that I was covering for Campbell; and then, when Campbell went out of the picture so far as I was concerned, MacNeely suggested that I take on the Ceco window line.

* * * *

23 Q. Prior to this time—prior to the time you had this conference with Mr. MacNeely—to your knowledge had

24 Ceco sold throughout the Southeastern States?

A. No, sir.

Q. Did they have any representative or sales office in the Southeastern States?

A. No, sir; not in the territory that was allotted to me.

Q. Not in the territory covered by the contract. The contract was entered into in March 1936, wasn't it?

A. Yes, sir.

* * * *

25 Q. I understand, then, that your past experience over a period of years had given you a knowledge of the peculiar requirements and of the peculiar aptitudes and abilities of individuals throughout this territory?

A. Yes, sir.

Q. And that based on that plus additional investigation you were in a position to recommend certain individuals or concerns to Ceco?

A. Yes.

26 Q. Did you so recommend subagents?

A. Yes.

Q. Do you recall how many of those subagents you recommended, Mr. Rosenbaum?

A. Eight that they either now do business through or with.

Q. Well, during the period prior to August 1942, how many subagents did you recommend?

A. I can't say exactly how many. I believe, though, that all that I recommended, they accepted; and those same ones are still doing business with Ceco as agents or still are buying from Ceco.

Q. You don't recall that any of the agents you recommended were refused contracts by Ceco?

A. No, I don't.

Q. Did Ceco subsequently cancel any contracts with subagents that you had recommended?

A. After they cancelled my contract in August 1942, they did.

Q. Prior to the time they cancelled your contract?

A. No, sir.

* * * * *

27 Q. How long did you represent Ceco on the steel joist contract before you entered into the contract with respect to the metal windows?

A. About two years.

* * * * *

28 Q. Do you know how the subagents designated by Ceco received information as to possible prospects for the products of Ceco?

A. In many different ways.

Q. Describe some of those ways.

A. One was by aggression—aggressive work in calling on architects and engineers. Another was by being called by contractors who were bidding on jobs. Another would be from the Builders' Exchange. The Builders' Exchange in Charlotte is called the A. G. C. office, which does the same service; or from me, as district representative, I was giving them information as it came to me from sources that I had that they didn't have; and then from Ceco, in Chicago, who periodically sent us clippings to follow that were taken from one of the trade magazines or several of the trade magazines that they subscribed to.

Q. Once the agent or subagent received the name of a prospect, was it ever necessary for you to cooperate with that agent in the sale of goods of Ceco?

A. Frequently.

Q. What was the nature of that cooperation by you?

A. Well, if the specifications were not to our liking or so that Ceco could bid on it, I would have to go to the architect or engineer that had written the specifications and show him why Ceco products were equal to what he had specified, and then to assist that agent, in the event that assistance was needed, in taking off a job, a take-off of which would be sent in to Chicago, priced, and sent back to the agent; and then when the bids were submitted by that agent, to see that our price was in line, to contact Chicago in the event that we were out of line, to let them know what competition was bidding, and then adjust that price in accordance with Ceco's wishes.

Q. In the event that the specifications were such that Ceco could bid on it, would a contract be entered into?

A. Yes, sir.

Q. Who signed that contract?

A. Ceco Steel Products and the buyer or customer in most cases. In some cases the agent bought in his own name, and then the contract was entered into between the agent and Ceco Steel Products.

Q. In the majority of cases, would it be fair to say that the contract was signed by Ceco and the ultimate purchaser?

A. That is right.

Q. The agent was not a party to that contract?

A. No.

Q. Were you a party to those contracts?

A. No.

Q. Were you advised when those contracts were entered into?

A. Yes.

Q. How were you advised of the entry into those contracts?

A. Either by wire from the agent or from Ceco, but always by Ceco that the contract had been accepted by them.

Q. How did the agent receive his remuneration?

A. The agent was paid a commission.

Q. Who paid the agent the commission?

A. Ceco.

Q. Did you in any instance pay a commission to an agent?

A. No, sir.

Q. How did you receive your own remuneration?

31 A. The same way—from Ceco by commission check.

Q. Did you receive a commission check as soon as the contract was entered into?

A. No; when the contract was paid for.

Q. When the contract was paid, you would receive a commission check on the basis of payment made?

A. Yes, sir.

Q. Was the contract subject to approval or disapproval by Ceco?

A. Yes.

Q. Were the terms of the contract laid down by the agent?

A. No, sir.

Q. Who specified the terms of the contract?

A. Ceco.

Q. During the time you were a representative of Ceco, did you receive communications from Ceco?

A. Frequently.

* * * * *

33 Q. Did Ceco follow the practice of sending you the names and addresses of individuals who had indicated their interest in the products of Ceco?

A. Yes, sir; in the territory I covered for them.

Q. What was the purpose—what was the stated purpose—in sending that information to you?

A. To see that I sent it to the agent for proper follow-up and possible sale.

* * * * *

Q. What was your procedure when you received that letter?

A. To send it to the agent in whose territory the prospect was located.

34 Q. Was any check made on the results of those inquiries?

A. Yes, sir.

Q. What was the nature of that check?

A. We received a report from the agent, and in turn forwarded it to Ceco.

Q. You have identified Petitioner's Exhibit 3, which is a mimeograph letter of November 26, 1937, with a facsimile signature of Ben MacNeely, Manager, Steel Joist and Lath Division. That letter is addressed to all offices and agents and refers to quotations on steel joists. The final paragraph reads, or the two final paragraphs of that letter read:

"Any jobs on which you have quotations outstanding below our published prices, we trust that you will make every effort to get them closed at the earliest possible date.

"Please do not fail to cooperate with us on this as we will not be inclined to accept business at lower than our published price."

Did you receive a number of these mimeograph letters addressed to all offices and agents?

A. Yes, sir.

* * * * *

35 Q. Did those letters contain provisions requiring you to comply with certain orders and instructions of the company?

A. Yes, sir.

Q. Did you so comply with those orders and instructions?

A. Yes, sir.

Q. Petitioner's Exhibit 4 is a letter from Ceco Steel Products Corporation, dated February 6, 1939, addressed to all agents. That letter commences:

"Under separate cover we are sending you a supply of Form 172, a sample of which is attached. We request that all quotations on Ceco products be made on this form whenever it is desired that Ceco Steel Products Corporation handle the contract in its entirety and you are acting as agent for this company."

Do you recall receiving that letter with the attached form?

A. Yes, sir.

Q. Will you look at that form, please?

A. Yes, sir.

Q. In your capacity as Harry L. Rosenbaum did you use that form for contracts which you negotiated?

A. The agent used the form.

36 Q. Did you ever have occasion to negotiate contracts and to use that form yourself?

A. Yes, sir.

Q. You negotiated those contracts, then, as agent for Ceco?

A. Yes, sir.

* * * * *

Mr. WOODRUM. Petitioner's Exhibit 5-B, Your Honor, is a mimeographed letter from Ceco Steel Products Corporation, dated June 19, 1939, addressed to all branch offices and representatives, re United States Housing Authority housing projects. The two final paragraphs, which are all that I am going to read at this point, read as follows:

"These instructions must"—underlined—"be definite and must"—underlined—"be followed 100 percent. If you have any questions to ask, kindly advise us now so that there will be no misunderstanding in the future.

37 "Will you please acknowledge receipt of this letter so we will know you understand how this is to be handled."

In response to that, the petitioner sent to the respondent a letter dated June 21, 1939, which is Petitioner's Exhibit 5-A, in which he said:

"You may rest assured that I am closely following, in your behalf, the Housing job referred to in your form letter of June 19th.

"Your instructions will be followed, and I sincerely hope that your price will be competitive."

* * * * *

38 Q. In addition to receiving letters from Ceco regarding possible prospective purchasers of the products of the company, did the company on any occasion ever call upon you, on another occasion, to perform any other service?

39 A. Yes, sir.

Q. Can you tell us the nature of those services?

A. Well, in collecting or seeing that the bills were paid when they were delinquent; to settle any controversy that existed between the agent and the customer; to send mechanics to properly adjust windows; and to do anything else. I mean numerous things; I just can't recall right at the minute.

Q. You refer to collecting accounts which were delinquent. Customarily was payment made through you?

A. No, sir.

Q. What was the custom with respect to payment for goods sold by Ceco?

A. The customer paid Ceco.

Q. Payment was made direct to Ceco?

A. Yes.

Q. In what circumstances would they call on you for collections?

A. When they were delinquent and did not pay up promptly.

Q. Did you receive any additional payment or compensation for those collections?

A. No, sir.

Q. Petitioner's Exhibit 7 is a mimeographed letter dated April 6, 1938, signed by the manager of the Steel Joist and Lath Division, addressed to all offices and agents. The
40 subject is: "Pre-cast slabs over steel joists."

That letter refers to certain provisions to be incorporated in contracts and sets forth the provisions as quoted, and concludes:

"We must have your cooperation on this and trust that you will see that all in your organization are informed on this subject and the use of this paragraph."

* * * * *

Q. Petitioner's Exhibit 8 is a letter dated May 27, 1939, signed by N. B. MacNeely, manager, which states:

"On the last steel joist job at Chapel Hill, North Carolina, which involves 28 longspan joists, and standard steel joists, it is my understanding that this job was sold by the Connors Steel Company of Birmingham, Alabama.

41 "I would appreciate your checking up with the contractor and find out who represented the Connors Steel Company on this sale. I believe that Joseph Fox handled the sale with the contractor and I would like to know definitely if this is the case.

"Trusting that you will let me hear promptly from you on this and thanking you in anticipation of your cooperation, we are

"Very truly yours."

Did you receive that letter?

A. Yes, sir.

Q. What was the controversy involved there, Mr. Rosenbaum?

A. On this particular job Joe Fox, who was manufacturer's agent in Birmingham, Alabama, a territory that was outside my territory, was selling Ceko windows and Ceko joists, and they wanted to know if Connors Steel Company were entering into a deal with Fox, or how, and they wanted to know if Connors sold the job, and if so, why they didn't get it themselves.

Q. Was Connors Steel Company a competitor of Ceco's?

A. Yes.

Q. Then, do I understand that Connors—

A. I was checking up on them to find out.

Q. You were checking at the direction of Ceko to find out whether or not their agent in Birmingham, Alabama, was representing a competitor?

42 A. That is right, yes, sir.

Q. Did you make the check that was required there?

A. Yes.

Q. And did you advise the company of the results which you found?

A. Yes, sir.

• • • • •

Q. During the time you were employed by Ceko, were relations between you and Ceko always extremely pleasant?

A. No, sir.

Q. There were differences, then, between you and Ceko on occasions?

A. Yes, sir.

Q. What did those differences relate to?

A. Well, I claim that frequently they were giving me higher prices than they were giving to the district offices and that they shouldn't be doing it, because I was doing the same work as their salary-paid employees and keeping them free from any expenses. I felt like I was entitled to the same consideration or better consideration than they were giving to district
43 offices. I wasn't getting as good consideration as district offices.

Q. Did those differences between you and Ceko arise on a number of different occasions?

A. Yes, sir.

Q. Were they amicably settled?

A. Yes, sir.

* * * * *

44 Q. How long did your two contracts with Ceko continue in effect, Mr. Rosenbaum?

A. Until August, 1942.

Q. Prior to August, 1942, and in the early spring of
45 1942, had there been any indication from Ceko that they contemplated cancellation of those contracts?

* * * * *

The WITNESS. During the early part of 1942 I was told that they were transferring from the general run of business to war work and they were not going to have windows and joists as readily available as they had prior to 1941, or before Pearl Harbor, I should have said.

* * * * *

46 Q. When did you decide to go into the service, Mr. Rosenbaum?

A. The day after Pearl Harbor.

Q. Did you at that time take steps looking to going into the service?

A. Yes, sir.

Q. Did you notify Ceko Steel Products Corporation of your intentions?

A. Yes, sir.

* * * *

47 Q. When did you go into the service?

A. July 20, 1942.

Q. When were your contracts cancelled?

A. August of 1942.

Q. I show you a letter dated August 6, 1942. Was this the first letter which you received from Ceko regarding cancellation of your contract?

A. Yes, sir.

Q. Prior to that time had Ceko ever notified you of their intention to cancel your contract?

A. No, sir.

* * * *

53 Petitioner's exhibit 18 was received in evidence

December 31, 1945.

Ceko STEEL PRODUCTS CORP.,

5701 W. 26th St.,

Chicago, Ill.

GENTLEMEN: On July 20, 1942, I was inducted into the Chemical Warfare Service, United States Army, for training and service and, on December 20, 1945, received a certificate of the satisfactory completion thereof. I am still qualified in all respects to perform those duties set forth in my contracts with you of March 27, 1936, and September 24, 1938.

Application is, therefore, made for the reinstatement of such contracts which were canceled by your letters of August 6, 1942, and August 11, 1942, and for my reemployment thereunder and in accordance with the terms therewith.

Very truly yours,

HARRY L. ROSENBAUM.

Petitioner's Exhibit 19 was received in evidence

CECO STEEL PRODUCTS CORPORATION,
OMAHA 1, *January 19, 1946.*

Mr. HARRY L. ROSENBAUM,
Roanoke, Virginia.

DEAR SIR: We wish to now acknowledge your letter of December 31, 1945, requesting your "reemployment" with Ceco.

We believe that you are under a misapprehension as to your relationship with Ceco prior to cancellation of our contract with you in August of 1942. We have carefully reviewed our file, and the contract documents together with correspondence clearly set forth that you were an independent contractor operating as a sales agent and it was distinctly understood at all times that you were not an employee of Ceco.

Our letters to you in August of 1942 intimated that we might be in a position to reestablish a relationship after the end of the war when we got back into our regular business. The plans which we have formulated in the meantime are based upon the operation of Ceco sales offices in the territory included in our former contracts with you and we therefore regret that the type of sales representation which you have to offer would not fit in with those plans.

It is our desire to treat you as fairly as we can under all of the circumstances and, with that thought in mind, we might be willing to pay you some commission on sales made by Ceco during the war years in the territory formerly assigned to you as our sales agent. We make this suggestion because we want to be absolutely fair with you and we wish to discharge any moral obligation which you feel may exist. We would be glad to have you come to Chicago to discuss this matter with us.

So that there will be no misunderstanding of our position, we are sending you herewith an additional termination notice.

Very truly yours,

CECO STEEL PRODUCTS CORPORATION,
J. E. GROGAN, *Secretary.*

JEGrogan/ER
enc.

55 Q. During the time you represented Ceco, Mr. Rosenbaum, did you also operate Roanoke Engineering Sales Company?

A. Yes, sir.

Q. What was the nature of Roanoke Engineering Sales Company?

A. As an agent covering the western half of the State of Virginia for manufacturers of various building products.

Q. Did Roanoke Engineering Sales Company enter into that contract with Ceco?

A. Yes, sir.

Q. Was that the usual subagent's contract?

A. Yes, sir.

Q. Similar to the contracts entered into by other subagents?

A. Yes, sir.

56 Q. Is Roanoke Engineering Sales Company a corporation?

A. No, sir.

Q. What is the nature of its existence?

A. I own it.

Q. Is it a sole proprietorship?

A. Yes, sir.

Q. Where does it maintain offices?

A. Roanoke, Virginia.

Q. What is the address in Roanoke?

A. 300 South Jefferson Street.

Q. Did you during that time likewise maintain your individual offices at the same address?

A. Yes, sir.

Q. How many persons were employed by Harry L. Rosenbaum individually?

A. My secretary.

Q. One secretary?

A. Yes, sir.

Q. Were any persons employed by Roanoke Engineering Sales Company?

A. Yes, sir.

Q. How many?

A. When—just prior to my entering the service, we had twelve on our regular pay roll and as many as twenty-five extras.

57 Q. What were the duties of the individuals employed by Roanoke Engineering Sales Company?

A. Well, they rendered a required service in buildings, either to the building trade or to the owners of buildings, in furnishing and installing various building materials.

Q. How many sets of books were kept by Roanoke Engineering Sales Company and Harry L. Rosenbaum?

A. Two.

Q. Were the expenses of the two separated and allocated?

A. Yes, sir.

Q. To whom were the expenses of the stenographer or secretary charged?

A. It was prorated.

Q. According to the amount of work that would be done?

A. Yes, sir.

Q. To whom were the expenses of the salaries of various employees of Roanoke Engineering Sales Company charged?

A. All charged to the Roanoke Engineering Sales Company.

Q. Were the businesses conducted by Harry L. Rosenbaum, exclusive representative of Ceco, and by Roanoke Engineering Sales Company separate and distinct businesses?

A. Yes, sir.

* * * * *

58 Cross-examination by Mr. CARMODY:

* * * * *

60 Q. In 1936, what other companies did you represent?

A. Lundell-Eckberg Manufacturing; and in 1936—wait a minute; that was 1936. That was a little later. Aetna Steel Products Corporation, Syracuse Fire Door Corporation, and Cornell Iron Works.

61 Q. You were manufacturer's agent for those companies in addition to Ceco?

A. I was district manager for them. That is what I considered my job with Ceco as.

* * * * *

Q. In addition to the companies you have enumerated, during the time that you were sales representative for Ceco did you represent the Elgin Stove and Fan Company?

A. Not personally; Roanoke Engineering Sales Company did.

Q. How about the West Virginia Rail Company?

A. The same thing applies.

Q. The Roanoke —

A. (Interposing.) Engineering Sales Company.

* * * * *

Q. How about the Anchor Post Fence Company?

A. The same thing—Roanoke Engineering Sales Company.

Q. How about the Morse-Boulger Destructor Company? Did you represent them?

A. Roanoke Engineering Sales Company did.

Q. How about the Rowell Screen Company?

A. The same—Roanoke Engineering.

62 Q. The Syracuse Fire Door Corporation?

A. I just told you that that was one of the companies I acted as district manager for and still do.

Q. Cornell Iron Works?

A. As district manager and still do.

Q. The others, you say now, were Roanoke Engineering Sales Company?

A. Yes, sir.

Q. How did you happen to sign these contracts "Harry L. Rosenbaum, contracting as Roanoke Engineering Sales Company"?

A. I didn't do that; I signed them as Harry L. Rosenbaum.

Q. I show you a paper writing which has been previously been shown you by your counsel, and which is Exhibit B to the stipulation heretofore filed in this case, dated September 8, 1938, stating on page 3 thereof: "Date of Acceptance: September 24, 1938"; Accepted by: Roanoke Engineering Sales Company. By: H. L. Rosenbaum."

A. That was not an agency contract, but it was our express understanding that I was sales representative or sales agent for Ceco, and I can go into that, if you would like me to.

Q. The first contract which was signed, which was in March, 1936, was also "Roanoke Engineering Sales Company, Harry L. Rosenbaum trading as Roanoke Engineering Sales Company," was it not?

A. That was trading as Roanoke Engineering Sales Company. That was the Ceco joint account.

Q. Now, did you make a separate income tax return for the Roanoke Engineering Sales Company?

A. No, sir, because I am the sole owner.

Q. Did you have separate bank accounts?

A. No, sir.

Q. Who paid the broker's commission of one percent to the State of Virginia?

A. Harry L. Rosenbaum trading as Roanoke Engineering Sales Company.

Q. You have testified that you had about twelve regular employees for Roanoke Engineering Sales Company and sometimes as many as 25 extras, and only one secretary for Harry L. Rosenbaum individually?

A. That is all I could use.

Q. Did that one secretary do any work which was allocated to the Rosenbaum Engineering Sales Company?

A. To Roanoke Engineering Sales, you mean?

Q. Yes, sir.

A. Yes, sir.

Q. She worked indiscriminately on that work and your other work, too?

A. Yes.

Q. Including work for Ceco Steel Products?

A. That is right.

Q. And including the other four companies of which you say you were district manager?

A. That is right; and if you would like to know how it was divided, I can tell you.

When you were conducting your negotiations with Ceco, you wanted to make sure, did you not, that in the event of any cancellation, they would cancel with the subagents at the same time?

A. Yes, sir.

Q. It was at your instance that that provision was put in the contract?

A. It was agreed between Mr. Louis Meyer, president of the company, and me before we negotiated this contract.

* * * * *

67 Q. With whom did you have your first discussion regarding the second contract, which was executed finally or accepted on September 24, 1938?

A. Ben MacNeely.

Q. He came down to Roanoke to see you, didn't he?

A. Yes, sir.

Q. You sat down and wrote out the terms you thought should be embodied in the agreement, did you not?

A. I don't think I wrote them out. I mean we were friends a very long time, and I merely told him what had happened to me with Campbell, and I don't recall any writing of any desires on my part at that time.

* * * * *

68 By Mr. CARMODY:

Q. I show you Respondent's Exhibit 3 for identification. I will ask you if you will look at it and tell me if it was not prepared in your office—prepared by you and typewritten in your office.

A. It is my stationery.

Q. Well, isn't that your typewriter?

A. Yes, sir; that is my typewriter.

Q. Don't you remember, now, having prepared that and having sent it on to Ceco?

A. I don't know whether I did that or whether Mr. MacNeely and I did it jointly or just what happened; but I don't deny having known about it.

Q. You knew about this Respondent's Exhibit 3, and that was the agreement—tentative agreement—that you and

69 Mr. MacNeely had entered into; is that right?

A. Mr. MacNeely and I didn't enter into any agreement, sir.

Q. Let me put it this way: They were the terms you wished embodied—that was your understanding—and he authorized you to put them in writing for him; isn't that the fact?

A. It may have been. I know that is my letterhead.

Q. That is reflected in this Exhibit No. 3; is that right?

A. Yes, sir; we won't deny that.

* * * * *

Paper entitled "agreement between Ceko Steel Products Corporation and Harry L. Rosenbaum was received in evidence as Respondent's Exhibit 3.

158 Mr. CARMODY. This is entitled: "Roanoke Engineering Sales Company, Roanoke, Virginia." These are the preliminary negotiations between the parties:

"Agreement between Ceko Steel Products Corporation and Harry L. Rosenbaum.

"Covers steel windows as manufactured by Ceko and screens for the same."

The next paragraph covers the territory. It enumerates some territory. I am not going to bother reading all of that.

The next paragraph provides that:

"Ceko may at any time with or without cause terminate the employment of the said manager by giving the manager 30 days notice of its election so to do, provided and upon condition that simultaneously with said discharge of said manager, all agents appointed or designated by the said manager are
159 discharged permanently."

Then it goes on, Your honor, to say—and this I call your attention particularly to—

"Ceko shall not [be] liable for any negligence or acts of omission or of commission on the part of the manager or agents, and this arrangement shall not be construed as binding Ceko on account of any act of the manager or agent. The parties hereto recognize the fact that Ceko does not direct the particular activities of the individual and that the individuals or manager are acting in other capacities as well; and further that the manager and agents receive no salaries from Ceko but are compensated solely on a commission basis as herein defined.

It is therefore the intent of the parties that Ceco shall not be liable for any acts of the manager or the agents and that the relationship of said manager and agents to Ceco is that of, in effect, independent contractors, rather than employees of Ceco.

"This agreement shall be for a period of one year," and so forth.

Q. Your negotiations regarding this window contract, especially, extended over a long period of time; isn't that right?

A. I don't think it was such a terribly long time, Mr. Carmody.

Q. Isn't it a fact that it started, maybe, in July; and while we have the date of acceptance as September 24, 1938, isn't it true that at late as October there was still correspondence about some particular phases?

A. I don't doubt that, sir.

Q. There was some question about how the 5 percent commission was to be paid, was there not, on sales, for instance, originating in your territory, but with delivery to places outside of your territory?

70 A. Yes, sir.

Q. There was some question about how the 5 percent was to be allocated on sales made outside of your territory but shipped into your territory?

A. Split commissions; yes, sir.

Q. That was all the subject of correspondence and negotiations, wasn't it?

A. Yes, sir.

Q. There was also some discussion about the question of erection, wasn't there?

A. Erection?

Q. Yes, sir—that is, erection to be done on the job?

A. Yes, sir.

Q. You insisted, did you not, that any profit that was to be had on the erection was to be to Harry L. Rosenbaum?

A. I don't remember whether there was any profit; but I had to make profit in order to direct and continue to pay my men.

Q. Do you remember some correspondence to the effect that if Ceco did the erecting, they would have to qualify in the

States, and you said you wanted to do the erecting anyway, in effect, and that you would take the profit on the job?

A. I don't remember the profit end. That was one of the services I had to offer Ceco, though—the fact that we had qualified men to erect.

71 Q. When you say it was one of the services you had to offer Ceco, you mean Harry L. Rosenbaum?

A. Harry L. Rosenbaum.

Q. Or Roanoke Engineering Sales Company?

A. Harry L. Rosenbaum.

Q. I understood you to say that Harry L. Rosenbaum had only one employee, and that that was his secretary.

A. Yes, sir; but we had erectors that were qualified to go out in the event we were needed.

Q. That was Roanoke Engineering Sales Company?

A. No, sir. When they went out for Ceco. Outside of Roanoke Engineering Sales Company territory, they were working for Harry L. Rosenbaum.

Q. You mean employees that had formerly been working for Roanoke Engineering Sales Company were then working for Harry L. Rosenbaum when they went out to do the erecting; is that right?

A. That is right, sir.

Q. You had quite a dispute, did you not, about the territory that this window contract was to cover?

A. I don't remember any "quite a dispute." I remember we wanted the same territory we had previously covered for Campbell.

Q. Do you remember a dispute particularly with respect to Stafford County?

72 A. Stafford County?

Q. Yes; in Virginia.

A. No, sir, I don't; I don't remember it.

* * * * *

163 (Letter of September 10, 1938, from Roanoke Engineering Sales Company to Ned A. Ochiltree was received in evidence as Respondent's Exhibit 6-B.)

Mr. CARMODY (reading):

"DEAR NED:

I am not reading the entire letter, Mr. Woodrum.

"This is in reference to your letter of the 8th, concerning the enclosed agreement.

"Apparently you have overlooked the fact that Richmond should cover all of the northern part of Virginia except the following counties:

"Fredericksburg, Clark, Loudon, and Fairfax. You have also overlooked the fact that southern West Virginia, including Huntington, Charleston, and White Sulphur, should be included in our territory. The C. & O. Railway is the dividing line in West Virginia. Furthermore, a glance at the map will show you that Knoxville and eastern Tennessee fit in with the territory outlined. I, therefore, request that the territory be changed as per the above.

"If we work on the basis of net prices to the dealer or agent, a commission of 5 percent on the net amount of each sale, after the agent's commission has been deducted, is O. K.

164 If we work on a sliding scale commission basis for the agent and dealer, I am to receive 5 percent on the gross amount of the sale, which includes the agent's or dealer's commission and transportation charges. Figuring freight complicates matters.

"Where you start—'It is understood,' etc., I prefer that the following wording be used:

" 'We may at any time, with or without cause, terminate this contract by giving you 30 days' written notice, provided and upon condition that simultaneously with the cancellation of the contract, all agents or dealers appointed or designated by me are discharged permanently. We may discharge you as our exclusive representative in any one or more of the territories designated and set up for dealers or agents, provided and upon condition that we shall permanently discharge the agent or dealer appointed by or designated by you in the particular territory in which you are discharged. Upon such discharge, we may appoint any other agent or dealer for said territory, provided and upon condition that the agent or dealer so employed shall not have been one designated or appointed by you.'

"You can see from the legal tone of this important paragraph that I have previously been mistreated by a reputable company, in whom I had explicit confidence. After I had done a
165 good job in getting the manufacturer established through agents and dealers, I was let out with no recourse whatsoever.

"Another point that has not been mentioned but is important is in regard to erection. I want complete supervision and authority to handle erection for you, the agent or dealer, to everyone's mutual benefit. In other words, there may be a time when an agent is prepared to erect, and I want to be the one who will have the final say."

* * * * *

80 Q. When they drew the contract, a copy of which is marked as Exhibit B to the stipulation which has been filed in the case, through inadvertence the States of North Carolina and South Carolina were left out; isn't that right?

A. Yes, sir.

Q. You wrote under date of October 31 calling attention to that, did you not?

81 A. Yes, sir.

Q. Commencing in about May of 1939 did you have some correspondence with Mr. Ochiltree regarding the elimination of West Virginia and Tennessee from the window contract?

A. I don't remember when the date was, but I had some correspondence with him.

Q. They wanted to eliminate—when I say "they," I mean the respondent or defendant in this case wanted to eliminate—West Virginia and Tennessee from the contract, and you would not agree to it, would you?

A. I believe that is correct, sir.

Q. You insisted that those two territories remain in the contract?

A. I believe that is right, sir.

* * * * *

83 Q. Do you remember that in October of 1940 Mr. Ochiltree expressed some dissatisfaction with the results that were being obtained by your agency and suggested a cancellation?

A. I don't remember the date, but I remember he called me to task.

Q. Do you remember the reason he ascribed for wanting to cancel it?

A. I believe it was due to our failure to get a fair share of the business in the territory. I am sure of that.

Q. Was it, first, negative coverage by your agents, and insufficient sales volume? Do you remember that being assigned as one of the reasons?

A. I don't remember coverage, but I remember he complained about the amount of business we were getting.

Q. This was long before Pearl Harbor, of course?

A. Yes, sir.

Q. And long before any thought of yours of going into the Army?

A. Yes, sir.

Q. Another ground he assigned was excessive sales costs due to your overriding commissions; do you remember that, too?

84 A. Very distinctly; yes, sir.

Q. Do you remember the time when there was a great deal of discussion about opening up a branch office for Ceco?

A. I don't remember when it was, but I remember it was discussed. For instance, that Charleston, West Virginia, territory deal was after they had opened up the Cincinnati office covered from West Virginia.

Q. You knew that they were contemplating opening up a branch office to cover the other territory in which you were operating?

A. I had no idea that that would happen.

Q. Weren't you trying to dissuade them or trying to prove to them that they could operate cheaper through you than having their own branch office carrying on the work that you were then carrying on?

A. On the contrary, the whole reasoning that I used in discussing my connection with Ceco, at the time I talked to Ben MacNeely and then later to Mr. Meyer, was that during the middle thirties, when business was not readily available, they didn't have to stand the expense of a district office and a district

manager but would pay me a commission based on the actual volume of business that I did, and that appealed to them.

* * * * *

86 Q. Finally, Mr. Rosenbaum, at or about this time, namely, in October or November 1940, you did agree to relinquish a part of the territory, did you not?

A. Yes, sir. I don't remember the date, but I agreed to relinquish a part of it.

Q. What part of it did you agree to relinquish?

A. I couldn't be exact on that, Mr. Carmody.

Q. Is it not a fact that you agreed to relinquish all of West Virginia and a certain portion of Tennessee?

A. I don't think all of West Virginia. I think I had just the southern half.

Q. Well, whatever part of West Virginia you had?

A. I believe that is right. I finally relinquished both of those territories, at any rate. I don't remember the date on which I did so.

Q. I show you Respondent's Exhibit 19 for identification, on the letterhead of Harry L. Rosenbaum. On the left-hand side it says: "Sales representative of Ceco Steel Products
87 Corporation." It does not say "district manager" on there, does it?

A. No, sir.

185 * * * * *

(Letter of April 3, 1942, from H. L. Rosenbaum to Ned A. Ochiltree was received in evidence as Respondent's Exhibit 19.)

"Dear Ned:

"I do not want to appear to be arbitrary and, therefore, feel that an explanation of my attitude concerning revised commissions is in order.

"It costs us 2½ percent before we open our doors to do business. The State of Virginia charges a wholesale brokers license tax of one percent. The City of Roanoke charges approximately half of this amount. We carry every conceivable type of insurance—workman's compensation, public liability, property damage, social security, etc., which involves about one-half of one percent.

"Now it may seem ridiculous to hear us say that this 2 percent on our gross volume of business is what we pay, but nevertheless that is the case. Bear in mind that we have not mentioned income tax, or any other costs. Nor have we taken into consideration, in telling you the story, that we have to pay rent, warehouse, operate automobiles, and have a fixed overhead that is not hay.

"And so you see, my friend, that we don't break even on a 2½ percent commission basis. You sit in Chicago and think that the fellow in our shoes has an easy time. And we don't blame you. But now that you know the story, please pass it on to your associates and if you want any more information we will be very glad to answer your questions."

* * * * *

Q. You wrote a letter dated April 3, 1942, which is Respondent's Exhibit 19 for identification, in which you said:

"It costs us 2½ percent before we open our doors to do business."

What did you mean by that?

A. Well, taxes, taxes, and more taxes; plus the fact that, as we state here, we carry every conceivable type of insurance, workmen's compensation, public liability, property damage, social security, and so forth. That involves about one-half of one percent, and that one-half of one percent, although not stated in this letter, is only that part of the material which we in most cases erect; and if we were not erecting, then our costs would not be that high.

Q. This is on the letterhead of Harry L. Rosenbaum, not of Roanoke Engineering Sales Company. I invite your attention to that fact. Do you care to make any explanation of that?

A. Well, I was interested in both things, Mr. Carmody—Roanoke Engineering Sales and Harry L. Rosenbaum.

Q. This all has to do with Harry L. Rosenbaum.

A. I told you a little while ago, I believe—if I did not, I am sorry—that when the agents in the territory, like Bowker and Roden in Richmond, used erection services, Harry L. Rosenbaum supplied them; and then when Roanoke Engineering Sales Company, an agent just like Bowker and Roden, used

erection services in the western half of Virginia or the territory that they covered, then they carried the expense of the erectors.

Q. I am not talking about the erectors now; I am devoting my attention to this letter of April 3, 1942, in which you say:

89 "It costs us 21½ percent before we open our doors to do business. The State of Virginia charges a wholesale broker's license tax of one percent. The City of Roanoke charges approximately half of this amount. We carry every conceivable type of insurance—workmen's compensation, public liability, property damage, and social security—which involves about one-half of one percent."

Then, later on you say:

"We have to pay rent, warehouse, operate automobiles, and have fixed overhead that is not hay."

This was all referring to Harry L. Rosenbaum?

A. The explanation I would make would be that in either instance it was Ochiltree selling Rosenbaum and Rosenbaum in turn trying to sell Ochiltree.

Q. But this letter had reference to all those expenses having been incurred by Harry L. Rosenbaum and not by Roanoke Engineering Sales Company?

A. If you interpret that that way, there is nothing I can say about that; but I gave you the explanation as it really was.

Q. Mr. Rosenbaum, you had no sales quotas imposed on you by the company, did you?

* * * * *

A. No, sir.

90 Q. You determined your own hours and plan of work, did you not?

A. Well, I answered any orders that were given me. I planned my own hours; but whenever I was requested to do something that required additional hours, I put them in.

Q. If the company made a request of you, as you have indicated here with respect, I believe you said, to the Carter Company, to do them a favor, you would go and do them a favor; is that right? But generally speaking, you could plan your own hours of work and your own itineraries; isn't that true?

A. No, sir; that isn't true. I worked all the time, night and

day, Sundays and night time. I never neglected any job or anything that Ceco wanted done. If they wanted something done, I did it.

* * * * *

Q. I said you planned your own work, whether you worked on Saturdays or Sundays. Whatever days you worked, you planned it?

A. I would say in general that is true, yes, sir.

Q. And your own routes and itineraries you planned, not only for Ceco but for the other companies you were representing?

A. I planned them according to their needs, though. I had to consider them. I, of course, did the planning,
91 just as a district manager did or a branch manager did.

Q. You testified that you were the district manager for Ceco; is that right?

A. That is what I considered myself; yes, sir.

Q. Why was it that your stationery did not have "district manager" but just had "sales representative"? Did you raise any question?

A. I believe I did raise a question.

Q. Do you have the correspondence on that?

A. No, sir, I don't.

Q. Do you know when you raised the question?

A. Just as soon as I got the letterhead.

Q. What was their answer to it? That you were sales representative, and that is why it was going to stay on there?

A. I would like to see the answer.

Q. I don't know of any. I am asking you.

A. Yes, sir, there was an answer. Unfortunately while I was in the Army some of my files were destroyed.

Q. How many times did you visit the office of the Ceco Company while this contract was in force?

A. I can't say, but I believe I paid my expenses each time that I went.

Q. Well, how many times did you go?

A. I don't remember, Mr. Carmody.

Q. Whenever you went, it was on a voluntary basis?

92 You were never required to go there, were you?

A. Well, I wouldn't call it required.

Q. You never attended any sales meetings of Ceco, did you?

A. No, sir; I never did.

Q. As to this overriding commission——

Q. You were paid this commission on all repeat orders whether or not you had solicited them if they were in your territory?

A. Yes, sir.

Q. At the present time you represent a number of manufacturers as manufacturers' representative, don't you?

A. I represent three manufacturers.

Q. At the present time?

A. Yes, sir.

Q. Who are they?

A. Aetna Steel Products Corporation, Syracuse Fire Door Corporation, and Cornell Iron Works.

100 EVIDENCE ON BEHALF OF THE RESPONDENT

ELMER T. GUSTAFSON

DIRECT EXAMINATION

101 Q. Where are you employed?

A. Washington, D. C.

Q. In what capacity?

A. District manager for Ceco Steel.

Q. Where is the office located?

A. 2011 K Street Northwest.

Q. How many employees do you have in that office?

A. We have five besides myself.

Q. When was the office opened?

A. December 20, 1945.

Q. When prior to that time had you been down here as district sales manager conducting operations?

A. I lived at the Hamilton Hotel and Statler Hotel and operated out of there from the middle part of 1943.

Q. So you were operating from the Hamilton and the Statler since 1943?

A. That is right. * * *

* * * * *

102 Q. Of what do the activities of that office consist?

A. We handle all Ceco products and sale execution of all those products, * * *

* * * * *

Q. Will you agree with me that they are the same products covered by these two contracts with Rosenbaum?

A. Plus some additional ones.

Q. All of the products of your company, in other words?

103 A. A complete line.

Q. What territory is embraced in your office?

A. The territory consists of Delaware, Maryland, District of Columbia, Virginia, North and South Carolina, and a portion of West Virginia.

* * * * *

Q. Do you know what office Tennessee comes under?

A. Tennessee comes under the jurisdiction of Birmingham, to my knowledge.

Q. Is that a branch office of Ceco like yours is?

A. That is a warehouse and district office, yes.

Q. Who pays your salary?

A. Ceco Steel Products Corporation.

Q. Who pays the salaries of all the people in the office?

A. Ceco Steel Products.

Q. Who directs your work and the manner of your work?

104 A. Our sales managers of various districts plus our other officers.

Q. Are you required to attend sales meetings of the company from time to time?

A. Yes, sir.

Q. Who appoints the agents in this territory under your jurisdiction?

A. The agents are appointed by me with the approval of the general office.

Q. Now, who does the erection work incident to contracts which are secured in this territory?

A. The work is handled directly by Ceko under my jurisdiction. All the work—Some materials are sold without erection. All erection taken is taken under the direct name of Ceko and handled by Ceko.

Q. Who fixes the territory in which you are to operate?

A. The general office.

Q. Is it true that all office expenses and all salaries of that office, including your own, are paid by Ceko?

A. That is correct.

Q. Do you have any other agent?

A. We have sales agents appointed in various parts of the territory.

* * * * *

105 Q. What does your work principally consist of now—that is, the sales end?

A. Sales of our products?

Q. Yes.

A. Our work is mostly in connection with our steel forms—centering on work in connection with steel forms for concrete joist construction—and the sale of steel windows and screens.

* * * * *

CROSS-EXAMINATION

* * * * *

106 Q. How is your salary determined?

A. My salary is a stipulated monthly salary plus a bonus—a certain amount of additional remuneration based on percentage of earnings.

Q. In other words, you get a flat monthly salary plus a commission on sales?

A. It is not a commission. I would not say it is a commission. It is a bonus based on net earnings.

Q. Your bonus is based upon what you sell?

A. It is on the money we make.

Q. Or the money you make?

107 A. It is not based on sales, because we can sell all kinds of materials. If we don't make money, we don't get any bonus. There is a difference.

Q. If you don't make any sales, you don't make any money?

A. That is correct.

Q. As district sales manager, what are your duties?

A. My duties are to direct the men under me in the matter of sales and the execution of our business.

* * * *

108 Q. You do have other sales agencies throughout the district?

A. We have other sales agents.

Q. Do you recall how many of those you have?

A. We have about four or five of them.

* * * *

116 NED A. OCHILTREE

* * * *

DIRECT EXAMINATION

* * * *

Q. Where are you employed?

A. I am employed at the general office of the Ceko Steel Products Corporation in Chicago.

Q. In what capacity?

A. I am their executive vice president.

* * * *

117 Q. Did you ever make negotiations with Mr. Rosenbaum pertaining to a contract—the so-called window contract?

A. Yes, sir.

* * * *

Q. Do not tell us what he said about his connections with Mr. Zipp, but what did you do with Mr. Zipp?

A. I instructed Mr. Zipp to go to Roanoke and see Mr. Rosenbaum and investigate the possibility of making a connection with him for the sale of our steel windows.

* * * *

118 Q. Based upon that report, did you make a decision with respect to Rosenbaum?

A. I did.

Q. What was that decision?

A. I decided that we should make a contract with him for the distribution of our windows in the territory, largely the same as he had represented us on joists.

* * * *

119 Q. * * * In deciding to enter into this contract with Rosenbaum, did you take into consideration the fact that he had a number of agents already throughout the territory in which he was to operate?

The WITNESS. That was my principal reason for arriving at the decision. We felt from our analysis of the territory and Mr. Rosenbaum's activities in already representing a number of other manufacturers on steel building products of a similar nature to ours—not competitive, understand, but he had an immediate distribution for our metal windows in that territory, and we frankly bought it in making a contract with him.

* * * *

120 Q. What, if any, correspondence or conversations did you have with respect to the forms or the stationery that was to be used?

A. Well, as I recall that, that came along somewhat later in our negotiations. Mr. Rosenbaum, I think, asked in correspondence and certainly in telephone conversations that we furnish him with company stationery, which we refused to do.

Q. Did he indicate what he wanted on that stationery?

A. I don't think he did so in writing, no.

Q. Did he verbally?

A. My understanding was that he asked that we furnish him with our regular letterhead with his name and title as district sales manager.

Q. You refused to do that?

A. That is right.

Q. Did you furnish him with stationery with "sales representative" as shown here in evidence?

A. Special stationery, printed, bearing his name as sales representative of Ceco.

* * * *

122 Q. Did there come a time when you indicated a desire to cancel the contract?

A. That is correct.

Q. Will you please tell the Court the reasons?

A. Well, some time in 1940, as I recall the date, in analyzing our sales from the territory, we felt that we were not receiving sufficient volume or satisfactory prices, and we so indicated to Mr. Rosenbaum by correspondence. We told him at that time that we were inclined to cancel the contract.

He quite naturally resisted that attitude on our part, and we finally, after some weeks and perhaps months of correspondence, compromised the matter by cutting down his territory, which was agreeable to him.

Q. Mr. Ochiltree, I will ask you whether or not in your organization as it is presently constituted you have any contracts similar to the one which you had with Rosenbaum?

A. We do not have, and we never had previously.

Q. You never had one previously?

A. That is right. That is unique.

Q. Will you tell the Court how your operations were conducted in all the other territories?

* * * * *

123

A. Well, our distribution generally throughout the country and elsewhere has been through branch offices, our own salaried personnel, and with certain agents operating under branch offices, who might specialize in certain of our products.

Q. Now, after Pearl Harbor was there any change in your company's business?

A. A very definite change came about in the early months of 1942, after Pearl Harbor.

Q. Will you please tell us the change?

A. Well, restrictions in the use of our materials. It became quite evident that our business would decline very rapidly and that we would be forced out of our regular line of business. So, to keep our organization together, we went into war work.

I personally came to Washington about this time in 1942, about March, and closed a very substantial contract with the Army Engineers for landing mats. That was quickly followed

with additional contracts with the Army Engineers on landing mats and Bailey panel bridges. We closed contracts with the Navy for stack for destroyers and ventilating systems for LST's. We did an enormous amount of work for the Maritime Commission. That work was done not only in our main
 124 manufacturing plant at Chicago, but it was done in a great many of our district plants throughout the country.

Q. At or about this time was there steel available in any quantities for your windows?

A. Well, the point is that that type of contract was restricted. Steel was needed in the war effort. Along later in that year we were completely out of business in our regular products; we discontinued their manufacture. They were, in fact, prohibited.

Q. What did you do then with your agency contracts?

A. We cancelled all of them throughout the entire United States.

Q. When was that? When were they cancelled?

A. Oh, late summer and fall of 1942. We cancelled Mr. Rosenbaum, we cancelled with all Mr. Rosenbaum's subagents, we cancelled with all our sales agents throughout the entire United States. We couldn't serve them, and we cancelled all contracts.

Q. Did your company have any postwar plans at or about this time or in 1943?

A. Well, certainly by 1943 we were beginning to think seriously about what we were going to do if and when the conflict ended.

Q. What plans were formulated?

A. Well, we went into every phase of our business in
 125 great detail. We not only overhauled our line of products; we put in new products. We took a look at our machinery, our methods, our shop methods and our selling and purchasing methods. We decided to double the capacity of our main manufacturing plant at Chicago and made decisions to add to the capacity of many of our district plants and to decentralize some of our manufacturing operations, carrying on some of them in some of our district plants.

Specifically with respect to the Eastern Seaboard, we reached the decision to build a fine new plant at Hillside, New Jersey, build an addition to our prewar operations of fabricating reinforcing bars, warehouse our products, and stick to manufacturing steel joists. We reached a decision to build a fabricating warehouse plant in Baltimore, Maryland, to open a branch office in Washington, and to open a branch in Jacksonville, Florida, and in that manner to cover the entire Eastern Seaboard.

We also, which has an effect on our operations in the Eastern Seaboard, added to the capacity of our Birmingham plant, Birmingham, Alabama, where we plan to manufacture the steel joists, which we had not done before the war.

All of those things have been done with the exception of the plant at Baltimore. There we have acquired property. We have put a track—side track—in. We have plans drawn, and they are simply awaiting CPA approval before
126 erecting the plant. Everything else I have related has been accomplished, and was accomplished largely by the end of 1945.

Q. Did the retention of Mr. Rosenbaum as sales representative fit in with those plans?

A. Not at all.

Q. Why?

A. Well, obviously we were set up to cover the territory which Mr. Rosenbaum and his sales organization of agents previously covered. We were set up to do that job with our own men.

Q. From what office?

A. Washington.

Q. Had Mr. Rosenbaum in the territory covered by the contract handled all of your products?

A. No; he handled only the products covered by the agreements, which are only part of our general line.

Q. Does the Washington branch office handle all products?

A. All products.

Q. Was that taken into consideration in the question of whether Mr. Rosenbaum was to be retained or not?

A. Very definitely it was the reason. In making our post-war plans, we changed our organization set-up here. We were getting only partial coverage.

Q. I believe you have testified that the postwar plans
127 included opening of a branch office in Washington?

A. That is correct.

Q. That was done?

A. Yes, sir.

Q. Mr. Gustafson was placed in charge?

A. That is correct.

Q. Will you please state whether or not the territory which is covered by your Washington office includes the territory theretofore served by Mr. Rosenbaum?

A. It does. I think it does as far as the final territory that we had under contract with Rosenbaum is concerned. Originally I think there was a part of Tennessee and some of West Virginia that was later cancelled with Mr. Rosenbaum which is not now in the Washington office territory, as I recall.

Q. Will you please, for the benefit of Court and counsel, contrast the operations when Mr. Rosenbaum was sales representative with the operations as they exist today in your Washington office?

A. Do you mean as to methods?

Q. As to methods.

A. Well, of course, Mr. Rosenbaum's agents' operations were on a limited number of products, specifically steel joists, windows, and screens; and I believe the usual method there was for the sales agent to find—that is, upon locating
128 a building prospect, a prospective sale, to make a take-off of the quantities of material involved, if he could do so, and send that take-off into Chicago for estimating and pricing. If it was an involved job, undoubtedly the plans were sent in for estimating at Chicago. Then the price would be determined by our general offices at Chicago and would be returned to the agent, and he would follow the sale; and if it was secured, the contract would be sent in to Chicago, and our engineering department there would prepare all the necessary detail work and drawings that were required, and they would be sent back to the architect or engineer for approval.

Once approval was obtained, shop orders would be prepared, the merchandise would be manufactured and shipped, and our office in Chicago would issue an invoice and pursue collection, and upon receipt of the final collection the agent and Mr. Rosenbaum would be paid their commission.

Now, as to the way we operate through branch offices, and the way we operate today and have since 1945 in Washington, in that same territory, a prospective sale—that is, with those few agents that we have in that territory—would be handled in much the same manner, except that the Washington office would perform all of the functions of the home office. They would do the engineering, they would do the details, they would prepare shop orders. All that the Chicago general office would do would be to manufacture the goods and ship it. Even the invoicing is done in Washington.

Of course, there are a great many products that Mr. Rosenbaum did not handle, and our activities on those products are ones of direct sales largely to the contractor and promotion with the architect, without the agent intervening. Historically we have not as a rule sold those products through agents, and we do not do so now.

Q. Where would the bills be sent from today for any sales in that territory?

A. Our invoicing is done from Washington on all sales in Washington office territory.

Q. Is this Washington office territory manned by employees of Ceco?

A. That is correct.

Q. Who pays all the expenses incident to that office?

A. The corporation.

Q. On what basis is the manager employed?

A. Mr. Gustafson is paid a salary—a monthly salary—paid bimonthly—and he also has an arrangement whereby he receives contingent compensation based upon the net profits of his territory. That is also true of a number of other key men in the organization in the Washington office—a similar arrangement.

Q. Does the Washington office have a sales quota?

A. Yes.

130 Q. Will you explain to the Court what you mean by a sales quota?

A. Well, I think these sales quotas generally—and they are certainly true in our business—are an estimate prepared by the general management of what we expect to do in the way of volume of business in our various products. Usually they are a target or goal that we are shooting at to insure profitable operations. Obviously that is prepared, in the initial stages, on an over-all company basis of what we expect to do throughout the entire organization. In the latter stages of our planning, we split that up and divide it among our branch offices. Each branch office is assigned a quota—a sales quota—their portion of the total job to do on each product. That is stated usually in terms of dollars of sales that we expect them to do on each product. The Washington office, the New York office, the Birmingham office—all our offices—have such quotas.

Q. When Mr. Rosenbaum was acting as sales representative, did he have any such quota?

A. No, sir.

Q. Do you have available in your organization any positions similar to the one occupied by Rosenbaum?

A. No, sir.

Q. Would it be possible under your present organizational set-up to have Rosenbaum act as sales representative?

131 A. No, sir.

Q. Would it be possible under your present organizational set-up to have a sales representative such as Rosenbaum act on only a part-time basis and handle only a portion of your products?

A. No, sir, obviously not.

Q. I show you Petitioner's Exhibits 3 and 4. Will you please tell the Court the policy of the company with respect to these bulletins? By that I mean to whom they were sent, and so forth.

A. Well, these are typical routine bulletins which we issue from each sales division to all offices and sales agents from time to time. They may cover changes in policy, they may cover changes in market conditions or competitive conditions, they may be informative of some new form to be used, as was done in

the case of this one bulletin. They are strictly general in character and go to all of our sales force. They are mimeographed and are not personalized in any way. It is our regular method of communicating on routine subjects of a general nature.

Q. I show you Petitioner's Exhibit 5-B. Will you please explain that?

A. Well, that is a typical bulletin in the same category as those I have just described.

This relates to the United States Housing Authority
132 program back in 1939 and 1940. Those jobs required a special type of steel casement. There was a tremendous volume of business potentially in the offing. We did not want any of our own branch offices or agents quoting on such jobs without our complete knowledge and approval; and these are instructions to that effect, issued generally to all branch offices and agents.

Q. And agents?

A. That is correct.

* * * * *

133 Q. Was Mr. Rosenbaum ever paid a salary by Ceco?

A. No, sir.

Q. On what basis was he compensated?

A. On the basis of our contracts with him, which was an overriding commission of 5 percent on the sales made in the territory covered by the contract, made by his agents, that 5 percent to be paid when our invoices were collected.

Q. He received that on all sales in the territory?

A. Yes.

Q. What, if any, control did the company exercise with respect to the hours and time of work that Mr. Rosenbaum put in for Ceco?

A. We had no control and attempted no control.

Q. Did you have any control over the customers he solicited or selected?

A. Well, we had the right, of course, to refuse business or refuse to make an agency contract which he might recommend.

Q. Well, who determined his hours and plan of work?

A. Mr. Rosenbaum, as far as Ceco was concerned.

134 Q. Who determined the method of salesmanship he should employ?

A. Well, as far as I know, Mr. Rosenbaum received no instructions from Ceco on that.

Q. State whether or not the orders were solicited on open account.

A. On what?

Q. On open account.

A. Well, all of our business is usually solicited on open account. If the credit of the purchaser is acceptable to our credit department, that is the way it is sold.

Q. Was it subject to acceptance of the credit by Ceco?

A. Exactly.

Q. Did the company exercise or attempt to exercise any control over Mr. Rosenbaum as to the amount of time he should devote to the company's affairs as sales agent?

A. No.

Q. I believe you have testified that there was no sales quota imposed upon Mr. Rosenbaum?

A. Exactly.

Q. Mr. Rosenbaum's headquarters were in Roanoke?

A. That is correct.

Q. Was he ever required to visit the company's headquarters?

A. I personally never asked Mr. Rosenbaum to come
135 to Chicago. I recall his having been there in our office at least once; and I think I saw him at a hotel in the Loop on another occasion. But I never asked him to come, and I don't know that anyone from Ceco ever did.

Q. Well, you were immediately in charge of that, were you not?

A. Yes.

Q. If he had been ordered or requested to come, you would have been the man to have issued the instructions?

A. Yes, sir; I would either have issued the instructions or approved of someone else doing so.

Q. Now, does your organization have regular sales meetings from time to time?

A. We do.

Q. Did Mr. Rosenbaum ever attend any of those sales meetings?

A. No, sir.

Q. Was he ever required to be at your office, as far as you know, for any official purpose?

A. No, sir.

Q. Would you say that his visits, if he did make them—I believe you have testified to one—were on a voluntary basis?

A. That certainly is my understanding.

* * * * *

CROSS EXAMINATION

136 Q. You testified that one of the reasons which induced you to enter into a contract with Mr. Rosenbaum regarding the sale of windows was that he had agents; is that correct?

A. That was our understanding; yes.

* * * * *

137 Q. When you say he had agents, then you mean that Mr. Rosenbaum, by reason of his activities and past business experience, knew of persons who were qualified to represent you; is that it?

A. Well, he already had negotiated contracts for these other principals with those agents.

Q. Are you under the impression that Mr. Rosenbaum had any contracts himself with those agents?

A. I don't know.

Q. These agents you referred to entered into contracts with Ceco?

A. Yes; exactly.

Q. So they were Ceco's agents, not Mr. Rosenbaum's?

A. Exactly, as far as our products were concerned.

Q. As far as your products were concerned, they were your agents, not Mr. Rosenbaum's?

A. Subsequently, after we had made contracts with them; that is correct.

* * * * *

139 Q. You have testified as to the changed conditions which confronted Ceco commencing in 1943. As I un-

derstood your testimony, it was with relation principally to new manufacturing facilities which Ceco has established throughout the country; is that correct?

A. Basically our postwar plans contemplated a very considerable expansion of our facilities for manufacturing.

Q. For manufacturing?

A. Yes; and obviously, in turn, an expansion of our
140 sales program.

Q. So Ceco is now, and has been at all times since this contract was entered into with Mr. Rosenbaum, engaged in the sale of steel joists, has it not?

A. Yes—well, we were not during the war.

Q. With the exception of the war period, Ceco has always been engaged in the sale of steel windows, has it not?

A. Not always, no; since the middle thirties.

Q. Well, when I say "always," I am referring to the time since the date of the contract with Mr. Rosenbaum.

A. That is right.

Q. Ceco is now engaged in the sale of steel joists and steel windows, is it not?

A. Correct.

Q. The territory which is covered by this present Washington office is substantially the same territory that was covered by Mr. Rosenbaum when his contract was in effect, is it not?

A. No; in addition, it covers the District, Maryland, and Delaware.

Q. Would it be fair to say, then, that the territory covered by the Washington office includes most of that covered by Mr. Rosenbaum?

A. That is correct.

Q. So the territory has merely been expanded some; is
141 that correct?

A. Yes.

Q. As I understand your testimony, then, the only difference in your method of doing business now is that Mr. Rosenbaum represented you only in certain products, whereas your Washington office represents you in certain additional products; is that right?

A. No, there is a third difference; that is, that Mr. Rosen-

baum represented us only part of the time, because he represented several other manufacturers of other products. We received only part of his time, and he had only part of our line. Our own salaried employees sell our complete line, and we have all of their services.

Q. Except for the fact that Mr. Rosenbaum represented you for only part of your products, and the fact that he represented additional manufacturers, as well as Ceco, is there any substantial difference in the method of doing business now?

A. Well, I explained in my testimony—previous testimony—that there is a substantial difference in the way we do business in that territory from the way we did it when Mr. Rosenbaum was there. Through our branch offices we have decentralized our sales force; and our Washington office being closer to the territory, we feel it will give it a much closer job of sales
142 promotion and development and contact with the trade generally than Mr. Rosenbaum could possibly do.

Q. The Washington office now is just carrying on certain of the activities that used to be carried on in the Chicago office; isn't that correct?

A. They are carrying on almost entirely all the activities that we used to handle in Chicago.

Q. So if Mr. Rosenbaum was now employed with Ceco, instead of corresponding with Chicago he would now correspond with Washington, wouldn't he?

A. Well, I don't see how that would operate, because we have never had an arrangement like that operating in our branch office. I don't know.

Q. Matters which formerly would have been sent to Chicago, such as take-off of price, and so forth, would now be sent to Washington?

A. That is right. That is the way we do it. That is the way we do it over the country.

Q. So your change is principally in your home office set-up and not in your method of doing business? In other words, you have decentralized your home office set-up?

A. That is right.

Q. Actually there is no reason why you could not have Mr. Rosenbaum representing you in Virginia?

143 A. * * * There is a very definite reason, in our judgment. Mr. Rosenbaum was not a full-time representative of Ceco; he spent only part of his time. What part, we don't know. He worked for other manufacturers as well. We have concluded that our best method of selling is to have a full-time representative on our full line.

* * * * *

144 Q. I do not believe you have quite answered my question. What relation did you consider Mr. Rosenbaum occupied with respect to Ceco? What was the relationship between Ceco and Mr. Rosenbaum?

A. Well, I think that he was there in the territory originally, from our standpoint, because of his long-time experience in the territory on these other products, and with these established agents of his, and he was just part of an agency that we bought.

Q. He was so much a part of the agency you bought that the routine interoffice correspondence and written instructions were sent to Mr. Rosenbaum just like they were sent to any other employee?

A. To all agents, yes; and to all branch offices.

Q. You considered Mr. Rosenbaum as an agent of Ceco; is that correct?

145 A. Exactly.

Q. Did Ceco ever attempt—and I am not trying to trap you on this question—did Ceco ever exercise any control over Mr. Rosenbaum, or did they ever direct his method or manner or doing business with respect to the products of Ceco, to your knowledge?

A. I am sure that our various division managers, particularly Ben MacNeely, in talking with Mr. Rosenbaum undoubtedly advised him on the proper method of selling steel joists and the selling arguments in behalf of our particular products versus competitive products. I do not know how much we may have done on windows on that score; I doubt very much because windows are more of a staple commodity.

Q. Did you consider, under your window contract, which is the one you are most familiar with, that you had a right to control the activities of Mr. Rosenbaum?

A. With respect to the sale of windows, I think we had the

right to ask Mr. Rosenbaum to do a specific thing for us, and I am sure Mr. Rosenbaum would have done it; but we did not attempt to control his time or assert a schedule of work.

Q. Did you consider that you retained the right to direct his activities with respect to the sale of windows?

A. On a specific assignment, I would think we would have that right with any agent.

* * * * *

146 Mr. WOODRUM. I should like to offer this as Petitioner's Exhibit 23.

(The paper referred to, containing signature of Mr. MacNeely, was marked as Petitioner's Exhibit 23 and received in evidence.)

* * * * *

147 A. The letter is dated July 6, 1936, and is on Concrete Engineering Company stationery.

"CHICAGO, ILLINOIS, July 6, 1936.

"MR. H. L. ROSENBAUM,
 "State and City Bank Building,
 "Roanoke, Virginia.

"DEAR HARRY: For some reason or other, you have forsaken the understanding which we have had with reference to the handling of our business.

"First, it was distinctly understood that all contracts would be taken in our name and on our form of contract. Second, it was understood that we would have the approval or refusal of the credit before any orders would be accepted.

"For a time, your orders were handled in this manner. However, we slipped through a couple of small orders such as the one from Barbour and Sons, and the longspan joists on the Wythe Building Corporation, without insisting on these regulations being adhered to.

"However, I find now you are sending us two very good sized orders wherein our form of contract was not used, namely, the Mountain Hotel and Sugar Grove School. I have written you regarding our requirements on these and trust that you will comply with our request.

"We now have the order for the Armory Building at Char-

lottesville, wherein you have quoted direct in your own
 148 name, and to make matters worse, the job is at such a
 price that we have no desire to fill it. We have absolutely no credit information on yourself or the Roanoke Engineering Sales Company in particular, in whose name this contract was taken. It becomes necessary therefore that you inform us in just what manner you intend handling this transaction to assure us of receiving payment, so that our credit department will have something to guide them in passing the acceptance of this order.

"I have repeatedly asked that a copy of all estimates and quotations by you in our name be furnished to us in time so that we can have a check on same, and also to guide us in deciding whether we wish the business at competitive prices or not.

"To sum up, you have agreed to do the following: First, furnish us with all copies of estimates and quotations when they are made; second, that all estimates and quotations shall be on the basis of our published prices; third, that all quotations and orders shall be on our contract form; fourth; that before deviating from our published prices, you are to have our approval.

"It is absolutely necessary if we are to continue our present relations that these agreements be adhered to.

"Very truly yours,

"CONCRETE ENGINEERING COMPANY,

"BEN MACNEELY,

"Manager, Steel Joist Division."

* * * * *

149 Q. If Mr. Rosenbaum did not comply with these requests and instructions, the company had the right to summarily discharge him on 30 days' written notice, didn't they?

A. They had the right; yes.

* * * * *

REDIRECT EXAMINATION

155 Q. You mentioned that you have paid salesmen who go out and cover the territory?

A. That is right.

Q. Do they go from the Washington office here?

A. Yes, sir.

Q. And they cover the territory theretofore covered by the Rosenbaum contract?

A. That is right.

* * * * *

RE-CROSS EXAMINATION

* * * * *

156 Q. Mr. Ochiltree, do you know whether Ceco, since December 20, 1945, has offered Mr. Rosenbaum any position with Ceco?

A. I am sure we have not.

* * * * *

167 (Letter of September 15, 1938, from Roanoke Engineering Sales Company to Ned A. Ochiltree was received in evidence as Respondent's Exhibit 7-A.)

Mr. CARMODY (reading):

"DEAR NED: This is in reply to your letter of September 12. Generally speaking, the revisions which you have made are satisfactory.

"Since Fredericksburg occurs in Stafford County, Virginia, and is closely followed from the Richmond office, we must insist on this one Virginia county which you excluded.

"We do not want to be bothered with estimating freight, and changed the set-up which was discussed with you in Chicago after talking to Bill Zipp in Roanoke. Originally we had the commission set up on an f. o. b. Chicago basis of 8 per-
168 cent on the first \$1,000, 5 percent on the next \$5,000, 3 percent on the next \$10,000, and 2 percent on contracts (which we don't hear about) above this amount. To eliminate complicated figures, we decided to make it 5 percent on the freight allowed net price to you, and we must maintain this position when you sell the agent on a net basis and permit the agent to add his commission. On the other hand, if you at some future date elect to change your set-up, and include in your prices to the agent that agent's commission, then we want

5 per cent on the total amount of the sale. It has occurred to me that, in say two years from now, after we have become fairly well established with the architects and contractors, you may see that some of the agents have been getting the big end of the profit. If this should happen, you might want to change your mind so far as the agent and dealer are concerned. Whereas I do not think that any of our connections will mistreat you or take advantage of the prices which you will have to quote to start the ball rolling, it might be well to include a clause in the contract to protect yourself. I naturally prefer net prices to the agent, and believe it is by far the best way to work, particularly in an uncertain market.

"We are erectors because we are in the window business. Our competitors erect. Some architects specify erection by the manufacturer. We protect the sale by having an
169 organization capable of competing. If we were to get the right price for erection, by this I mean book prices, you would be entitled to compensation for carrying the account, but we don't intend to get the right prices, and, therefore, by protecting your sale we do not feel it is fair for you to have a profit on the erection.

"Incidentally, you state that we are to receive our commission when you have been paid in full by the customer. Since the accounts are being handled by you, and collections made by you, I don't see why it is fair to hold me liable for your errors. You have certainly protected yourself so far as acceptance of orders is concerned, and I do not feel it is unreasonable to request that I be paid in proportion to the amount you are paid. If a customer pays you only 50 percent of your contract, then I think I am entitled to 50 percent of my commission. To date we have never had a loss, over 15 years of window experience, but a contract is a binding document, which should protect both parties when something unusual occurs."

* * * * *

174 (Letter of May 29, 1939, from Ceco Steel Products Corporation to Harry L. Rosenbaum was received in evidence as Respondent's Exhibit 11-C.)

Mr. CARMODY (reading):

"Dear Harry: We have been reviewing our sales in different

territories and have concluded that competitive conditions in West Virginia are such that we cannot secure business there unless we go directly to the contractor or at least confine our coverage to one sales agent.

"In Tennessee you have not been at all active and as competition there is pretty much the same as it is in West
175 Virginia, we are wondering whether it would not be best from your standpoint as well as ours to cancel these two territories from our agreement with you. In other words, eliminate West Virginia and Tennessee.

"On the basis of our experience to date, this certainly will not hurt you and it might help us. What do you say?"

On the bottom of that letter, which is the original letter, in pencil, which counsel has stipulated is in the handwriting of his client, the petitioner, there is the following:

"Ned: I say not"—underscored—"with regrets. Have been very active in Tennessee and West Virginia with excellent prospects. Rome was not built in a day.

"HARRY."

* * * * *

177 (Copy of letter of October 28, 1940, from Ceco Steel Products Corporation to H. L. Rosenbaum was received in evidence as Respondent's Exhibit 14.)

Mr. CARMODY (reading):

"DEAR HARRY: We have been reviewing our various
178 agency arrangements and the two agency contracts we have with you—one covering joists and the other covering window products, have been the subject of considerable discussion within our own organization here.

"Frankly, none of us are at all satisfied that either arrangement is worth continuing from your standpoint or from ours. The amount of business we have jointly secured during 1940 has not been profitable for either of us.

"Before advising you formally of our wish to cancel, I have felt we should exchange viewpoints. All of us here have the most friendly feeling toward you, personally. We would like to continue with you, but after two years of experience, feel that we could do a better job working along different lines."

* * * * *

(Letter of October 30, 1940, from H. L. Rosenbaum to Ned A. Ochiltree was received in evidence as Respondent's Exhibit 15.)

"DEAR NED: Several years ago I visited with Mr. Louis Meyer in Hot Springs, at his invitation, to discuss arrangements that were consummated by the two agency contracts referred to in your letter of October 28.

179 "Any possible criticism which your organization in Chicago may have of the result obtained, I believe to be chiefly due to reasons beyond my control. When I left Chicago in August, after talking to you, Ben MacNeely, and Bill Zipp, I felt that the future looked bright, and that when the new addition was completed we could anticipate the desired results.

"You have never visited with me in Roanoke, and I feel that due to the tremendous amount of money and time I have spent in your behalf I am entitled to the courtesy of a visit from you before any formal action is taken. In Roanoke I am prepared to show you records and facts which will prove that any change which you would care to make at this time would be entirely unfair to me.

"My opinion today is the same that it was before entering into these contracts with you, namely, that the expense to Ceco to operate a branch office is greater than the expense to Ceco involved in my contracts.

"And so, I am asking you, in the words of Al Smith, 'Let's look at the record.'

"Your frank expression and more complete advice will be appreciated at this time."

* * * * *

184 (Letter of February 14 1941, from H. L. Rosenbaum to Ned A. Ochiltree was received in evidence as Respondent's Exhibit 18-B.)

* * * * *

"DEAR SIR: This will refer to your letter of November 30, 1940.

"This is your authority to eliminate me from our window arrangements in the State of West Virginia. I wish you luck.

"I am also willing to relinquish a major part of the Tennessee

territory. However, the counties east of and including Morris-town can best be handled from this office.

"I trust that this adjustment of territory will end our discussion of the matter and, furthermore, hope that you accomplish your objective of obtaining much better results through your own branch offices."

* * * * *

186 (Copy of letter of July 10, 1942, from Ned A. Ochil-tree to Harry L. Rosenbaum was received in evidence as Respondent's Exhibit 20.)

* * * * *

"MY DEAR HARRY: I have been intending to write you, suggesting that we cancel our agency contract on windows and joists for the duration, with a new deal, if any, to be made after the war. It is no longer possible for us to get steel and we are going out of the window and joist business. We have, to a very large extent, liquidated our inventories and even if we are able to get a little steel and continue operations, which I seriously doubt, our manufacture will be on a minimum basis and our own direct sales force will sell many times what we can make.

"This situation, coupled with the fact that when the war is over we will undoubtedly have a realignment of our sales activities, with new products, different ways of making the old ones, etc., indicates to us that we should sever our agency contract with you and your subagents.

187 "Moreover, John Ludvik tells me you are going into the Service. I envy you and congratulate you on the opportunity. If it were not for the fact that we have in recent months, to a very considerable extent, converted our activities here to the manufacture of war materials, I think I would try to follow suit.

"Please know, Harry, that if it was at all possible to carry on and do any business with you, I would certainly have no objection to doing it. But with conversion to war production here and your leaving for the Service, it seems best to have all the decks clear.

"Before writing you a formal letter to this effect, I would appreciate hearing from you.

"With best personal regards, I am."

* * * * *

188 Mr. CARMODY. I will also ask Your Honor to take judicial notice at this time, as part of my case, of Section 171 (a) of the Code of Laws for the State of Virginia.

* * * * *

192 In the District Court of the United States for the District of Columbia

Civil Action No. 36622

Filed Sep. 5, 1946. Charles E. Stewart, Clerk.

HARRY L. ROSENBAUM, 527 WYCLIFFE AVENUE, ROANOKE, VIRGINIA, PETITIONER

v.

CECO STEEL PRODUCTS CORPORATION, A CORPORATION, FORMERLY CONCRETE ENGINEERING COMPANY, A CORPORATION, 2011 K STREET NW., WASHINGTON, D. C., RESPONDENT

PETITION FOR ENFORCEMENT OF VETERANS' RIGHTS UNDER THE SELECTIVE TRAINING AND SERVICE ACT OF SEPTEMBER 16, 1940, AS AMENDED, PUBLIC LAW 783, 76TH CONG., TITLE 50, U. S. CODE APPENDIX, SECTION 308, AND PUBLIC LAW 213, 77TH CONG., AS AMENDED

Comes now the petitioner, by Edward M. Curran, United States Attorney in and for the District of Columbia, and for cause of action against the respondent alleges as follows:

1. That this petition is brought under the provisions of Section 8 of the Selective Training and Service Act of 1940 (54 Stat. 890, 50 U. S. C. Appendix, Section 308), as amended (56 Stat. 724), and Public Law 213, 77th Cong., as amended, and is within the jurisdiction of the above Court under the provisions thereof.

2. That the petitioner resides at 527 Wycliffe Avenue, Roanoke, Virginia; that the respondent is a corporation and has

offices and does business at 2011 K Street NW., in the District of Columbia.

3. That on or about March 27, 1936, the petitioner was employed by the respondent corporation in the position of sales representative for the respondent corporation in the States of North Carolina and South Carolina, and in portions of the States of Virginia, West Virginia and Tennessee, a position which the petitioner held with the respondent until on or about August 6, 1942.

4. That on or about August 6, 1942, the petitioner left said position with the said corporation for the purpose of entering the armed forces of the United States and did enlist in the Chemical Warfare Service of the United States Army on July 20, 1942, and entered upon active service on July 20, 1942.

5. That subsequently, and on December 20, 1945, the petitioner satisfactorily completed his period of training and service with the Chemical Warfare Service and received a certificate of honorable discharge on that date, evidencing the satisfactory completion of training and service in the armed forces.

6. That thereafter on or about December 31, 1945, the petitioner applied for reemployment with the respondent corporation by letter to said corporation, addressed to their main office in Chicago, Illinois, and the application of the said petitioner to his former position, status and pay was refused by the said corporation by letter dated January 19, 1946.

7. That the position left by the petitioner on or about August 6, 1942, to enter the United States armed forces was a position other than temporary with the respondent corporation; that at the time of application for his former position on December 31, 1945, and at all times thereafter, the petitioner was qualified to perform the duties of his position.

8. That on or about August 6, 1942, the respondent corporation purported and attempted to discharge the petitioner and thereafter on or about, to wit, January 19, 1946, illegally refused to reinstate and reemploy the said petitioner.

9. That the respondent corporation since January 19, 1946, has at all times failed and refused to reinstate the petitioner to his former position in violation of Section 8 of the Selective

Training and Service Act of 1940, as amended, although requested to do so.

194 10. That because of the unlawful action of the respondent corporation in discharging the said petitioner, this petitioner was damaged by the loss of commissions which should have accrued to the use and benefit of the said petitioner pursuant to the terms of the contract of his employment, copies of which are attached hereto and made a part hereof.

WHEREFORE, this petitioner respectfully prays:

(a) That this Court adjudge and decree that the petitioner is entitled to be reinstated to his former position with the respondent corporation, in conformity with the terms and conditions of the contract between the petitioner and the respondent corporation.

(b) That the respondent corporation be required to reinstate the petitioner and to pay the petitioner commissions which have accrued to him from the date of his requested reinstatement.

(c) That the respondent corporation be required to account to the petitioner for all commissions due him during the aforesaid period.

(d) That a preliminary injunction issue requiring the respondent to restore the petitioner pending the trial of this case, and that at the hearing such injunction be made permanent for the period of one year from the date of such restoration, subject solely to discharge for legal cause.

(e) And for such other and further relief as to the Court may seem just and proper.

Edward M. Curran,

EDWARD M. CURRAN,

United States Attorney.

By Daniel B. Maher,

DANIEL B. MAHER,

Assistant United States Attorney.

HARRY L. ROSENBAUM,

Petitioner.

District of Columbia, ss:

Harry L. Rosenbaum, being first duly sworn on oath, deposes and says that he is the petitioner described in and
195 who executed the above and foregoing petition; that he has read the same and knows the contents thereof and the same is true except as to those matters alleged to be on information and belief, and as to those matters he believes them to be true.

Harry L. Rosenbaum,
HARRY L. ROSENBAUM.

Subscribed and sworn to before me this 5 day of September, 1946.

CHARLES E. STEWART, *Clerk.*
By H. B. DIETZBAUGH,
Deputy Clerk,
Notary Public, D. C.

Filed Sept. 5, 1946. Charles E. Stewart, Clerk.

197 This agreement, dated March 27, 1936, between the Concrete Engineering Co., 1141 North 11th Street, Omaha, Nebraska, a Corporation of the State of Nebraska (hereinafter called the Principal), and Harry L. Rosenbaum, State & City Bank Building, Roanoke, Va., doing business as the Roanoke Engineering Sales Co., (hereinafter called the Representative).

The Principal hereby appoints the Representative to act as exclusive representative for the Principal to solicit orders for products hereinafter specified through Agents which said Representative will appoint to act direct for the Principal upon the approval and their acceptance by the Principal when such products are to be bought by purchasers who are located in the following described territory. Agency contracts are to be written per Exhibit "A" attached subject to approval of Principal.

Products cover: CECO Standard Round Bar and Angle Top Chord Joist, CECO Nailer Joist, Long Span Trusses, and accessories, shown in the Principal's literature as Standard.

Territory: All of Virginia, except the Counties of Frederick, Clark, Loudon, Fairfax, Prince William, Fauquier, Warren,

Shenandoah, Page, Madison, Rappahannock, Culpeper, and Staffords: the States of North Carolina and South Carolina.

Principal agrees to pay the Representative an overriding commission of 5 percent on the net amount after transportation charges and Agent's commission have been deducted, on sales of such products sold by the Principal on orders obtained by the Agent. This commission payable when sales are made at prices satisfactory to the Principal, and this commission becomes due after the Principal has received payment in full from the Purchaser.

This agreement and the representation hereby created shall continue for a period of one year from the date hereof unless sooner terminated by either party hereto by the giving of not less than thirty (30) days written notice by personal delivery or by registered mail, postage prepaid, of the intention of such party to terminate this Agreement to the other party hereto, and the termination of this Agreement shall become effective thirty (30) days after the date on which such notice shall have been so delivered or mailed.

In event the Principal cancels this agreement with the representative, All Agencies created for the Principal by the representative shall be cancelled at the same time, and the Principal agrees not to renew any agreement with said Agents for a period of not less than nine months from date of cancellation.

Should the representative cancel this agreement, the Principal has the right to continue such Agents as the Principal may elect without further commission to Representative.

CONCRETE ENGINEERING COMPANY,

Principal.

By LOUIS A. METZ,

Vice-President.

H. L. ROSENBAUM,

Representative.

By H. L. Rosenbaum,

CONCRETE ENGINEERING COMPANY,

By

Secretary-Treasurer.

Attest:

Attest: ANN M. SEDIGO.

198

EXHIBIT "A"

This Agreement, dated, between the Concrete Engineering Company, 1141 North 11th Street, Omaha, Nebraska, a Corporation of the State of Nebraska (hereinafter called the Principal) and (hereinafter called the Agent).

The Principal hereby appoints the Agent to solicit orders for products hereinafter specified when such products are to be bought by purchasers who are located in the following described territory.

Products: CECO Standard Round Bar and Angle Top Chord Joist, CECO Nailer Joist, and Accessories, shown in the Principal's literature as Standard.

Territory:

Principal agrees to pay the Agent a commission of 10% on the net amount of the sale after transportation charges have been deducted. This Commission payable when sales are made at the full schedule of prices of the Principal and this Commission becomes due after the Principal has received payment in full from the Purchaser.

This Agreement and the representation hereby created shall continue for a period of one year from the date hereof unless sooner terminated by either party hereto by the giving of not less than thirty (30) days written notice by personal delivery or by registered mail, postage prepaid, of the intention of such party to terminate this Agreement to the other party hereto, and the termination of this Agreement shall become effective 30 days after the day on which such notice shall have been so delivered or mailed.

CONCRETE ENGINEERING COMPANY,

Principal.

By

Attest:.....

.....

Agent.

By

Attest:.....

199

CECO STEEL PRODUCTS CORPORATION

CHICAGO, ILL., September 8, 1938

Filed Sept. 5, 1946. Charles E. Stewart, Clerk.

Mr. HARRY L. ROSENBAUM

*Roanoke Engineering Sales Company**State and City Bank Building**Roanoke, Virginia*

Dear Mr. ROSENBAUM: I have been away from the city and otherwise unnecessarily delayed in writing you our understanding of the arrangement between us, whereby you are appointed our exclusive representative to solicit orders for the products indicated below through agents which you will appoint to act directly for us, subject to our approval and acceptance of such agents and the orders sold by them.

The products covered by this agreement are as follows:

Windows:

Pivoted

Projected (Commercial)

Projected (Architectural)

Continuous—Top Hung

Basement

Utility

Casement (Residential)

Metal Frame Insect Screens

Metal Weatherstripping

Doors:

Swing

Slide

Special Types

Mechanical Operators and Industrial Steel Partitions

The territory covered by this agreement is as follows: All of Virginia except the counties of Frederick, Clark, Loudon, Fairfax, Prince William, Fauquier, Warren, Shenandoah, Page, Madison, Rappahannock and Culpepper; also that portion of southern West Virginia lying south of the C. & O. Railroad except the counties of Putnam, Cabell, Lincoln and Wayne; also that portion of the State of Tennessee east of and including the

following counties: Hamilton, Bledsoe, Cumberland, Fentress and Pickett.

We agree to pay you an overriding commission of 5% on sales made by your agents in the territory designated above, this commission to apply on the net amount of each sale after agents' commissions have been deducted, and such commissions to be payable after we have received payment in full from the purchaser.

199-A It is understood that in no case will you or any of your agents have the authority to accept an order or make a contract in our behalf without first obtaining our complete approval, and no order or contract made by you or your agents shall be binding upon us unless acceptance of such orders or contracts is given in writing by a duly authorized officer of our company.

It is understood that this arrangement is to become effective immediately upon your acceptance in writing in the space provided below and shall continue in effect from the date of such acceptance until terminated by either party by the giving of not less than thirty days' written notice. It is further understood that should we elect to cancel this contract we may do so by giving you thirty (30) days' written notice providing, however, that simultaneously with the giving of such notice to you our contracts with all agents or dealers appointed or designated by you under this agreement will likewise be permanently cancelled. It is further understood that such cancellations with you and simultaneously with your agents or dealers may be made in all of the territory covered by this agreement or in any portion of the territory designated herein, and upon such cancellation we may appoint any other agents or dealers for such cancelled territory providing and upon condition that the agents or dealers so appointed shall not have been one previously designated or appointed by you.

It is further understood that we are not to assume any responsibility whatsoever for the execution of the field erection portion of any contract made by you or your agents under this agreement, and should field erection be required on any contracts submitted to us by you or your agents, you will agree to

assume full and complete responsibility for the supervision and handling of such field erection and will contract such field erection separately in your own name.

You are to diligently pursue the promotion and sale of the CECO products listed herein, securing necessary agencies subject to our approval and generally arrange adequate sales representation for us in the territory assigned to you. We are to furnish such catalogs, price lists, samples and other advertising literature as we may have available and generally assist you in the promotion and sale of these products in your exclusive territory.

We believe this summarizes the important points of our understanding and if it is acceptable to you, please so indicate by signing two copies of this letter in the space provided in the lower left-hand corner, indicating the date of your signature, returning both copies to us here. We will then sign and return one copy to you for your files.

Very truly yours,

CECO STEEL PRODUCTS CORPORATION,
/S/ NED A. OCHILTREE, *Vice-President.*

Accepted by: Roanoke Engineering Sales Company

By:

/s/ Harry L. Rosenbaum

Date of acceptance September 24, 1938

200 In the District Court of the United States for the
District of Columbia

Civil Action No. 36622

HARRY L. ROSENBAUM, 527 WYCLIFFE AVENUE, ROANOKE, VIR-
GINIA, PETITIONER

v.

CECO STEEL PRODUCTS CORPORATION, A CORPORATION, FORMERLY
CONCRETE ENGINEERING COMPANY, A CORPORATION, 2011 K
STREET NW., WASHINGTON, D. C., RESPONDENT

Filed Sept. 30, 1946. Charles E. Stewart, Clerk.

ANSWER

Comes now CECO STEEL PRODUCTS CORPORATION and, without waiving any objection or exception to the defects in the petition or to the jurisdiction of the Court in the premises, for answer to the petition heretofore and on or about September 5, 1946, filed herein, respectfully shows:

1. Denies the allegations of paragraph 1 of the petition.

2. Demands strict proof of the allegation of paragraph 2 as to the residence of the petitioner; as to the residence of the respondent says that the respondent is a corporation organized under the laws of the State of Nebraska and having its principal place of business in Chicago, Illinois, and that it has an office at 2011 K Street, NW., in the District of Columbia.

3. Denies the allegations of paragraph 3 of the petition and specifically denies that on or about March 27, 1936, or at any other time, the petitioner was employed by the respondent;

denies the allegation that he held the position of
201 sales representative with the respondent from March 27, 1936, until on or about August 6, 1942, insofar as said allegation alleges or is intended to allege that petitioner was an employee of or employed by respondent during said period; and denies that the petitioner was ever employed by or an employee of the respondent within the meaning of the selective training and service act of September 16, 1940, as amended (public law 783, 76th congress, title 50 United States code appendix, section 308) or public law 213, 77th congress, as amended.

4. Denies the allegations of paragraph 4 of the complaint insofar as the allegation therein that "the petitioner left said position with the said corporation" alleges or is intended to allege that on or prior to August 6, 1942, the petitioner was an employee of or employed by the respondent; demands strict proof of the other allegations of the said paragraph 4.

5. Being without information upon which to form a belief as to the correctness of the matters and things set forth in paragraph 5 of the petition, denies the same and demands strict proof thereof.

6. Denies the allegations of paragraph 6 of the petition; and in that behalf says that on or about December 31, 1945, the petitioner addressed to the respondent a letter, received in due course of mail thereafter by the respondent, in which the petitioner purported or attempted to apply for reemployment with the respondent, which purported or attempted application the respondent denied by letter dated January 19, 202 1946, and addressed to the petitioner; the petitioner, as aforesaid, never prior to his entering the armed forces of the United States or at any other time having been employed by or having the position, status, or pay of an employee of the respondent.

7. Denies each and every allegation contained in paragraphs 7, 8, and 9 of the petition.

8. Answering paragraph 10 of the petition, denies that the action of the respondent in the respects aforesaid or any action of the respondent has been unlawful; denies the allegation of said paragraph that the respondent discharged the petitioner; and denies that the petitioner has been damaged by any action of the respondent. Further answering the allegations of the said paragraph and referring to the contracts attached to the petition and referred to in paragraph 10 thereof as "the contract of his employment," respondent says that contracts dated respectively, March 27, 1936, and September 8, 1938, and of the purport of the alleged copies thereof annexed to said petition were by the petitioner and the respondent executed and delivered on or about said dates respectively, and in that behalf the respondent further shows:

A. As appears from the said contracts, they were and are not contracts of employment; and the position and status of the petitioner thereunder was not that of an employee but of an independent contractor. The petitioner in fact was never employed by the respondent, but was independently engaged in the business of a so-called manufacturer's 203 representative, acting as an independent agent for and representing to the extent specified in said contracts and not otherwise, the respondent, and likewise acting as agent for and representing other manufacturers. Petitioner at his own expense maintained his office, furnished all equipment (includ-

ing his own automobile) and office supplies necessary or in his discretion desirable in carrying on his activities pursuant to said agency; used stationery bearing his own name; employed others to work for him at his expense; and did not work under the direction of the respondent but carried on said activities without supervision. Petitioner was assessed for and paid the taxes of the State of Virginia levied on separate businesses and occupations; received the commissions payable to him under the said contracts without deduction on account of social security taxes; and was not covered by workmen's compensation, unemployment or group life insurance maintained by respondent for its employees.

B. Prior to petitioner's entry into the military service, each and both the said contracts were terminated in accordance with their terms, as the respondent by said terms and under
204 public law 783, 76th congress, as amended, and public law 213, 77th congress, as amended, had lawful right to do, and neither of the said contracts at any time since said termination has been or is now of any force or effect.

C. Since July 20, 1942, the business of the respondent, the methods of transacting the same, and the circumstances surrounding the same, including its business within the territories specified in the agreements formerly outstanding between the parties hereto, copies of which are attached to the petition herein, have so changed that the respondent no longer has available, to the petitioner or to anyone else, any such alleged position or employment as is referred to in the said petition, including said alleged contracts. By reason of such change in business, change in methods of carrying on business and changed circumstances the petitioner, even if ever employed by respondent or entitled to be reinstated to his alleged former position (which respondent denies) was not at the time of the filing of said petition and is not now entitled to such reinstatement under the selective training and service act of 1940, as amended or otherwise; and it is impossible for the respondent to restore the petitioner to his alleged position, or to a position of such seniority, status, and pay as the petitioner in said petition alleges and claims.

Wherefore, having fully answered, respondent prays that
 the petition and claim of the petitioner be dismissed
 205 and that respondent go hence without delay, recovering
 from the petitioner herein its costs most wrongfully
 sustained.

WHITEFORD, HART, CARMODY & WILSON,
 JOHN J. CARMODY

Of Counsel,

POPPENHUSEN, JOHNSTON,

THOMPSON & RAYMOND,

Anan Raymond,

ANAN RAYMOND,

Of Counsel,

Attorneys for respondent.

208 In the District Court of the United States for the
 District of Columbia

Civil Action No. 36622

HARRY L. ROSENBAUM, PETITIONER

v.

CECO STEEL PRODUCTS CORPORATION, A CORPORATION,
 RESPONDENT

Filed Jan. 6, 1947. Charles E. Stewart, Clerk.

STIPULATION OF CERTAIN FACTS

It is hereby stipulated by and between counsel for petitioner
 and counsel for respondent that at the trial of this action the
 following facts may be considered as true by the Court:

(1) Harry L. Rosenbaum, the petitioner, is a resident of the
 City of Roanoke, Virginia, and at all times mentioned herein
 has done business under the style of "Harry L. Rosenbaum"
 and/or under the style "Roanoke Engineering Sales Company,"
 sole proprietorship.

(2) Ceco Steel Products Corporation, the respondent, was
 incorporated under the laws of the State of Nebraska on July
 27, 1914, under the name Concrete Engineering Company. On
 June 26, 1937, the respondent's name was changed to Ceco Steel

Products Corporation. Since on or before December 20, 1945, the corporation has maintained an office at 2011 K Street, NW., Washington, D. C.

(3) Under date of March 27, 1936, and September 24, 1938, contracts were entered into by and between petitioner and respondent, copies of which said contracts are attached hereto and marked Exhibits "A" and "B" respectively.

(4) Pursuant to and in accordance with the provisions of such contracts, respondent entered into contracts with the following agents, all of whom were selected and recommended by petitioner:

R. R. Robertson, Charlotte, N. C.

Kline Iron & Metal Company, Columbia, S. C.

Bowker & Roden, Richmond, Va.

J. O. Olter, Norfolk, Va.

209 S. R. Goldman, Asheville, N. C.

Guaranteed Weatherproofing Company, Greensboro, N. C.

Piedmont Iron Works, Spartanburg, S. C.

Roanoke Engineering Sales Co., Roanoke, Va.

On any sales made by the foregoing agents petitioner was paid an overriding commission.

(5) On August 6, 1942, and August 11, 1942, respondent wrote to petitioner the letters attached hereto and marked Exhibits "C" and "D" respectively. On August 17, 1942, petitioner under the name and style of Roanoke Engineering Sales Company wrote to respondent letter attached hereto and marked Exhibit "E."

(6) On July 20, 1942, the petitioner entered the Chemical Warfare Service, U. S. Army, and was discharged therefrom on December 20, 1945, with a certificate of satisfactory completion of service.

(7) Petitioner at all times mentioned herein was the exclusive agent for manufacturers of other building products not related to the products of the respondent but did not during the interval March 27, 1936, to August 6, 1942, inclusive, represent manufacturers, other than respondent, of products covered by the contract of March 27, 1936, and did not during the inter-

val September 24, 1938, to August 6, 1942, represent manufacturers, other than respondent, of products covered by the contract of September 24, 1938.

(8) Petitioner received as his only compensation from respondent a commission on the selling price of sales under the contracts dated March 27, 1936, and September 24, 1938, in the territories covered by such contracts. Petitioner maintained his own independent office, in which he carried on his business of representing respondent and other manufacturers. Petitioner hired, fired and paid the employees of such office, furnished his own equipment, and paid all of his own expenses including, without limitation, rent, office, supplies, traveling and other expenses without reimbursement therefor from respondent.

(9) Respondent did not at any time pay any Old Age Benefit Tax or Unemployment Compensation Tax on the commissions paid to petitioner, under any Social Security
210 Law, or Unemployment Compensation Act, nor were any employee contribution deductions made from such commissions on account of any such Act. The benefits of compensation insurance were not extended to petitioner by respondent, and the commissions paid to petitioner by respondent were not included in the basis for determining premiums under any compensation or liability insurance policy carried by respondent. Respondent at all times herein mentioned maintained a group insurance plan for its employees, and at no time were the benefits of such plan made available to petitioner.

(10) H. L. Rosenbaum regularly paid from his own resources to the State of Virginia at all times herein mentioned the wholesale merchandise broker's license tax on commissions received from respondent.

(11) Whenever during the operation of the contract of September 24, 1938, a purchaser of products covered therein desired to purchase the products installed in place, the contract or arrangements for such erection was entered into between the purchaser and H. L. Rosenbaum who hired persons to make such installation, paid their wages, deducted Federal Old Age Benefit Tax from, and carried workmen's compensation and un-

employment compensation insurance coverage on, such persons.

(12) It is expressly stipulated by and between counsel for the petitioner and respondent herein that each of the said parties reserves the right to submit evidence touching upon the issues involved.

Dated this 13th day of December, 1946.

Clifton A. Woodrum, Jr.,

CLIFTON A. WOODRUM, JR.,

Attorney for petitioner.

WHITEFORD, HART, CARMODY & WILSON,

By: John J. Carmody,

JOHN J. CARMODY,

Attorneys for respondent.

211

EXHIBIT A

Same as Original Contract of March 27, 1936 (Jt. App. 89)

213

EXHIBIT B

Same as Contract of September 24, 1938 (Jt. App. 91)

216

EXHIBIT C

Filed Jan. 6, 1947. Charles E. Stewart, Clerk.

CECO STEEL PRODUCTS CORPORATION,

CHICAGO, August 6, 1942.

Mr. H. L. ROSENBAUM

c/o Roanoke Engineering Sales Co.

1st Street and Franklin Road

Roanoke, Virginia

DEAR MR. ROSENBAUM: The uncertainty of existing conditions and the difficulties of obtaining materials, all occasioned by the war, makes it appear necessary for us to cancel our agency contract with you covering steel joists, dated March 27, 1936, and contract covering steel windows, doors, screens, and weatherstrips, dated September 24, 1938.

We wish to thank you for the splendid cooperation you have extended us and we trust that when the present crisis has been

passed we can again re-negotiate new agency contracts with you.

Yours very truly,

CECO STEEL PRODUCTS CORPORATION
(S) Louis A. Metz
LOUIS A. METZ
Vice President.

217

EXHIBIT D

Filed Jan. 6, 1947. Charles E. Stewart, Clerk.

CECO STEEL PRODUCTS CORPORATION,
CHICAGO, August 11, 1942.

Mr. H. L. ROSENBAUM
c/o Roanoke Engineering Sales Co.
1st Street and Franklin Road
Roanoke, Virginia

DEAR MR. ROSENBAUM: In checking over our letter to you of August 6 we note that we inadvertently omitted the second paragraph of same and our communication should have read as follows:

"The uncertainty of existing conditions and the difficulties of obtaining materials, all occasioned by the war, makes it appear necessary for us to cancel our agency contract with you covering steel joists, dated March 27, 1936, and contract covering steel windows, doors, screens, and weatherstrips, dated September 24, 1938.

"We hereby cancel our agency contracts with you as above enumerated in accordance with their terms, such cancellation to be effective 30 days from the date hereof.

"We wish to thank you for the splendid cooperation you have extended us and we trust that when the present crisis has been passed we can again re-negotiate new agency contracts with you."

Yours very truly,

CECO STEEL PRODUCTS CORPORATION
(S) Louis A. Metz
LOUIS A. METZ
Vice President.

218

EXHIBIT E

Filed Jan. 6, 1947. Charles E. Stewart, Clerk.

ROANOKE ENGINEERING SALES Co.,
ROANOKE, VA., August 17, 1942.

Mr. LOUIS A. METZ, *Vice President,*
Ceco Steel Products Corp.,
1141 North 11th Street,
Omaha, Nebraska

DEAR MR. METZ: Thank you for your letter of August 6th. We, too, regret the necessity for terminating our contract. We have enjoyed our relationship with Ceco in the past and hope that we may look forward again to working with you when the present crisis is over.

With best wishes we remain,
Yours very truly,

ROANOKE ENGINEERING SALES Co.
By (S) J. C. ROSENBAUM

219 In The District Court of The United States for the
District of Columbia

Civil Action No. 36622

HARRY L. ROSENBAUM, PLAINTIFF

v.

CECO STEEL PRODUCTS CORPORATION, A CORPORATION, FORMERLY
CONCRETE ENGINEERING COMPANY, A CORPORATION, DEFEND-
ANT

Filed Mar. 26, 1947. Charles E. Stewart, Clerk.

MEMO OPINION

In my opinion the plaintiff does not qualify under the provisions of Section 8 of the Selective Service Act in that he was not in the employ of the defendant, but held the status of an independent contractor. I am also of the opinion that if plaintiff were to be treated as an employee the defendant's circumstances have so changed as to make it unreasonable to restore the plaintiff to the same or a like position.

The attorneys for defendant will please submit formal findings and conclusions in conformity with this opinion.

March 26, 1947.

JAMES M. PROCTOR,
Justice.

220 In the District Court of the United States for the
District of Columbia

Filed May 6, 1947. Charles E. Stewart, Clerk.

Civil Action No. 36622

HARRY L. ROSENBAUM, PETITIONER v. CECO STEEL PRODUCTS
CORPORATION, A CORPORATION, RESPONDENT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner files this action pursuant to the provisions of the Selective Training and Service Act of 1940 (50 U. S. Code App. Sec. 308 (e)), as amended.

By his complaint, Petitioner seeks a judgment requiring the Respondent corporation to reinstate him to his former position, in conformity with the terms and conditions of the contracts between Petitioner and Respondent, and further that the Respondent be required to pay commissions, which Petitioner alleges have accrued to him from the date of his requested reinstatement, and an accounting for all commissions due Petitioner during the aforesaid period.

The case was advanced for hearing, and the court after considering the pleadings, stipulations of counsel, exhibits, and testimony makes the following findings of fact.

1. Petitioner, Harry L. Rosenbaum, is a citizen of the United States and a resident of the city of Roanoke, Virginia. On July 20th, 1942, Petitioner entered the Chemical Warfare Service, U. S. Army, and was discharged therefrom on December 20th, 1945. On December 31st, 1945, Petitioner addressed a letter to Respondent requesting reinstatement, which request was denied by Respondent.

2. Respondent, Ceco Steel Products Corporation, was incorporated under the laws of the State of Nebraska on July

27th, 1914, under the name Concrete Engineering Company. On June 26th, 1937, Respondent's name was changed to Ceco Steel Products Corporation.

221 3. Petitioner, since 1920 has been engaged in business as a manufacturer's representative, with his office and headquarters at Roanoke, Virginia. He has conducted such business under the style either of "Harry L. Rosenbaum" or "Harry L. Rosenbaum, trading as Roanoke Engineering Sales Company," or both.

4. On March 27th, 1936, Petitioner, under the name and style of Roanoke Engineering Sales Company, and Respondent entered into a written contract, under the terms of which Petitioner was appointed by Respondent to act as the latter's exclusive representative to solicit orders for certain steel products of Respondent, consisting principally of round bar and angle joists, through agents which Petitioner should appoint, such appointment being subject to the approval of Respondent. The territory in which Petitioner was to operate was definitely fixed by the terms of the contract in question and covered all of Virginia, except the Counties of Frederick, Clark, Loudon, Fairfax, Prince William, Fauquier, Warren, Shenandoah, Page, Madison, Rappahannock, Culpeper, and Stafford; the States of North Carolina and South Carolina.

The foregoing contract was executed by the parties after negotiations during which Petitioner suggested changes in the form and content thereof, including a requirement by Petitioner that if Respondent cancelled the agreement, that all agencies created for the Respondent should be cancelled at the same time, and the Respondent would not renew any agreement with said agents for a period of not less than nine months from date of cancellation. The court finds that in negotiating and executing this contract, the parties dealt at arm's length.

5. On September 24th, 1938, Petitioner under the name and style of "Roanoke Engineering Sales Company by H. L. Rosenbaum" and Respondent entered into another written contract, in the form of a letter, under the terms of which Petitioner was appointed exclusive representative for Respondent to solicit orders for certain other products of Respondent, consisting

principally of steel windows and doors, through agents
 222 appointed by Petitioner to act directly for Respondent,
 subject to the latter's approval and acceptance of such
 agents and the orders sold by them. The territory covered by
 said contract embraced all of Virginia except the Counties of
 Frederick, Clark, Loudon, Fairfax, Prince William, Fauquier,
 Warren, Shenandoah, Page, Madison, Rappahannock, and Cul-
 peper; also that portion of southern West Virginia lying south
 of the C. & O. Railroad except the Counties of Putnam, Cabell,
 Lincoln and Wayne; also that portion of the State of Tennessee
 east of and including the following Counties: Hamilton,
 Bledsoe, Cumberland, Fentress and Pickett. The court finds
 that the States of North and South Carolina were also included
 in the territory covered by this contract, but the same were
 omitted from its provisions through inadvertence when the
 contract was originally prepared, but the Petitioner noticed
 the omission on or about October 31st, 1938, and called the
 same to Respondent's attention and the latter thereupon
 agreed to the inclusion of said two states in addition to the
 territory hereinbefore specified.

Prior to entering into said contract, the Petitioner and Re-
 spondent had numerous conferences, and a great deal of corre-
 spondence was exchanged by the parties as to its terms, par-
 ticularly as to the territory to be covered, and the method and
 amount of compensation to be paid thereunder.

During the initial stages of the negotiations, there was pre-
 pared in Petitioner's office, on his typewriter, on a letterhead
 of the "Roanoke Engineering Sales Company," a memorandum
 stating that it was the intent of the parties that the relation-
 ship between Petitioner and Respondent was to be, in effect,
 that of an independent contractor rather than an employee of
 Respondent. This memorandum was prepared by Petitioner
 in collaboration with a representative of Respondent, who had
 been sent to Roanoke to discuss terms with Petitioner.

While the contract in the form of a letter is dated September
 8th, 1938, and purports to have been accepted by Petitioner
 on September 24th, 1938, the court finds that the parties
 223 did not agree as to all of its terms until the latter part
 of October 1938, and that from August 1938 to and

including October 1938, the parties were negotiating as to the terms and conditions of said contract, during which the parties dealt at arm's length.

During such negotiations, the Petitioner requested that the Respondent furnish stationery showing the name of Petitioner as "District Manager" of Respondent, but the latter refused to do so and furnished instead stationery bearing Petitioner's name and address in the top center thereof, and in the upper left hand corner, "Sales representative Ceco Steel Products Corporation," and in the upper right hand corner, "Steel windows, Metal Frames, Screens, Metal Weatherstrips, Standard Joists and Longspan Joists."

6. On May 29th, 1939, Respondent suggested the elimination of West Virginia and Tennessee from the Petitioner's contract, but Petitioner refused to eliminate said States from the operation of said contract.

Again on July 15th, 1940, Respondent suggested the elimination of Charleston, West Virginia, from the operation of the window and door contract dated September 24th, 1938, but Petitioner refused to agree to such elimination.

On October 28th, 1940, and again on November 1st, 1940, Respondent wrote Petitioner of its intention to cancel both contracts, ascribing as a reason inactive coverage and excessive sales costs, and after correspondence between the parties, Petitioner agreed on February 14th, 1941, to elimination of West Virginia from the window and door contract dated September 24th, 1938.

7. On August 6th, 1942, and August 11th, 1942, Respondent wrote to Petitioner cancelling both contracts, and at the same time also cancelled contracts with the agents appointed by Petitioner, with the approval of Respondent.

8. Petitioner at all times mentioned herein, in addition to acting as sales agent for the Respondent, was the exclusive agent for manufacturers of other building products not related to the products of the Respondent, but did not, during the interval

March 27th, 1936, to August 6th, 1942, inclusive, 224 represent manufacturers other than Respondent, of products covered by the contract of March 27th, 1936, and did not during the interval September 24th, 1938, to August

6th, 1942, represent manufacturers other than Respondent, of products covered by the contract of September 24th, 1938.

9. Petitioner received as his only compensation from Respondent a commission on the selling price of sales under the contracts dated March 27th, 1936, and September 24, 1938, in the territory covered by such contracts. Petitioner maintained his own independent office, in which he carried on his business of representing Respondent and other manufacturers. Petitioner hired, fired and paid the employees of such office, furnished his own equipment, and paid all of his own expenses including, without limitation, rent, office supplies, travelling and other expenses without reimbursement therefor from Respondent.

10. Respondent did not at any time pay any Old Age Benefit Tax or Unemployment Compensation Tax on the commissions paid to Petitioner, under any Social Security Law, or Unemployment Compensation Act, nor were any employee contribution deductions made from such commissions on account of any such Act. The benefits of compensation insurance were not extended to Petitioner by Respondent, and the commissions paid to Petitioner by Respondent were not included in the basis for determining premiums under any compensation or liability insurance policy carried by Respondent. Respondent at all times herein mentioned maintained a group insurance plan for its employees, and at no time were the benefits of such plan made available to Petitioner.

11. The Petitioner, Harry L. Rosenbaum regularly paid, from his own resources, to the State of Virginia at all times herein mentioned, the wholesale merchandise broker's license tax on commissions received from Respondent.

12. Whenever during the operation of the contract of September 24th, 1938, a purchaser of products covered therein desired to purchase the products installed in place, the contract or arrangements for such erection was entered into between the purchaser and the Petitioner, who hired persons to
 225 make such installation, paid their wages, deducted Federal Old Age Benefit Tax from and carried workmen's compensation and unemployment compensation insurance coverage on such persons.

13. As to both contracts, Petitioner was free to solicit orders at whatever time and manner he chose and from whatever customers he selected, and Respondent did not direct or control Petitioner in regard to what customers he should solicit, or as to the time, place or manner of such solicitation. Petitioner determined his own hours and plan of work, his own schedules, sales routes and itineraries. Orders were solicited on open account and were subject to refusal by Respondent. Petitioner was not required to, nor did he, spend full time or any particular time in the sales work of Respondent's products covered by the two contracts, and Petitioner determined the amount of time he would spend on such work, and the amount of time he would spend on the work of the other manufacturers which he then represented.

14. Respondent's office was not Petitioner's headquarters, and he visited Respondent's office whenever it was convenient for him to do so, and such visits as were made were on a voluntary basis and not at the request of the Respondent. Petitioner was not required to attend any regular or scheduled sales meetings of Respondent, and no sales quota was imposed upon him by Respondent.

15. Commencing in the spring of 1942, the Respondent became engaged in war work and during July, August, and September, 1942, cancelled all agency contracts because of the scarcity or non-availability of materials, particularly windows.

16. In 1943, Respondent had formulated a postwar planning program, having for its object, after the end of hostilities, increased tonnage and the streamlining of sales and changes in methods of selling; that such program included the establishment of a branch office in Washington, D. C. This branch office covers the same territory as that previously covered by the contracts with Petitioner, with the exception of the State of Tennessee. In addition, the territory of such branch office also embraces the States of Maryland, all of Virginia, Dela-

226 ware and the District of Columbia. Such office was established in 1943, and the branch manager thereof operated for a time from a local hotel due to the inability of Respondent to locate an office in the District of Columbia; that Respondent eventually located offices and

signed a lease therefor for three years with an option for two additional years and moved into and occupied said premises on or about December 20th, 1945, where it conducts its business in the territory aforesaid. That said office is in charge of a branch sales manager who is paid on a salary basis by Respondent, and all of the expenses of such office, including the rents, supplies, telephone, salaries of employees, are paid by Respondent and all of the activities thereof and the employees therein, including the manager, are under the direction and control of Respondent; that such branch office handles all of the products of Respondent as contrasted to the limited number covered by the contracts with Petitioner; that all sales in the territory are under the supervision and control of the branch manager in the Washington office, and said manager is charged with the duty and responsibility of promoting the sale of all of Respondent's products in said territory; that when Petitioner was sales agent for Respondent, the estimates were sent to Respondent's home office in Chicago, where such estimates were priced and sent back to the agent. If Respondent were the successful bidder, plans would be obtained by the agent and sent to Chicago, where the Respondent's engineers analyzed and checked said plans, and all bills were sent from Chicago. Under Respondent's present operations, the pricing of estimates, the checking of plans by engineers, and all correspondence are carried on by employees in the Washington branch office, and all bills are sent from that office.

17. Respondent operates in 26 States of the Union, and in its entire organization it did not have, nor does it now have, any contracts similar to the contracts which it had with Petitioner, and Respondent does not now have available in its organization any position similar to the one occupied by Petitioner herein. The court furthermore finds that it would not be possible, under Respondent's present organizational set-up, to have the Petitioner act as sales representative, handling
 227 only a comparatively few of Respondent's products on a part time basis, when it has an office with its own employees who are subject to its direction and control, handling all of the Respondent's products and doing all of the work previously performed by Petitioner in the territory specified in

Petitioner's contracts, and that it would be unreasonable to require Respondent to restore Petitioner as prayed in his complaint.

Based upon the foregoing findings of fact, the Court makes the following conclusions of law:

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the subject matter of this suit under Sec. 8E of the Selective Service and Training Act of 1940 (50 U. S. Code App. Sec. 308 (e)), as amended.

2. The contractual status of Petitioner was that of an independent contractor and as such, Petitioner is outside the scope of the provisions of Sec. 308 of the Selective Training and Service Act of 1940, as amended. Petitioner has failed to show that prior to his induction in the United States Army, he held a position in the employ of the Respondent Company, and therefore, his petition must be denied.

3. That even if Petitioner were to be treated as an employee of Respondent, the circumstances of Respondent have so changed since July 20th, 1942, and prior to December 31st, 1945, as to make it unreasonable for Respondent Company to reinstate Petitioner, and Respondent was and is now fully justified in refusing to reinstate Petitioner.

By the Court.

JAMES M. PROCTOR,
Justice.

No objection as to form.

DANIEL B. MAHER,
Atty for def.

228 In the District Court of the United States for the
District of Columbia

Civil Action No. 36622

HARRY L. ROSENBAUM, PETITIONER

v.

CECO STEEL PRODUCTS CORPORATION, A CORPORATION,
RESPONDENT

Filed May 6, 1947. Charles E. Stewart, Clerk.

JUDGMENT DISMISSING COMPLAINT

Upon consideration of the complaint and of the answer thereto, and of the Stipulation, exhibits and testimony, and after argument by counsel for the respective parties, it is, by the Court, this 6th day of May 1947, ADJUDGED, ORDERED AND DECREED as follows:

1. That said complaint be, and the same hereby is, dismissed, and the Clerk of this Court is directed to enter Judgment herein for Respondent.

2. That Respondent shall not be entitled to recover any costs in this cause.

By the Court.

JAMES M. PROCTOR,
Justice.

No objection as to form.

DANIEL B. MAHER,
Atty for def.

BRIEF FOR APPELLEE

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

*United States Court of Appeals
for the District of Columbia*

No. 9667

FILED MAY 7 1946

Joseph W. Stewart
CLERK

HARRY L. ROSENBAUM, *Appellant,*

v.

CECO STEEL PRODUCTS CORPORATION,
A Corporation, *Appellee.*

JOHN J. CARMODY,
ROGER J. WHITEFORD,
Attorneys for Appellee.

INDEX.

	Page
Counterstatement	1
Summary of Argument	7
Argument	8
I. The relationship of employer and employee does not obtain in this case	8
(a) Parties dealt at arms length in negotiating contracts	9
(b) Parties did not intend to, nor did they, enter into an employer-employee relationship	10
(c) Appellee did not control or have the right to control Appellant's work or the manner in which it should be done	12
II. Even if it be assumed that Appellant was an employee, Appellee's circumstances have so changed as to make it unreasonable to require Appellant's reinstatement as such employee	13
III. A liberal construction of the Selective Training and Service Act does not justify a distortion of its provisions so as to embrace relationships far removed from the concept of employment	16
Conclusion	21

TABLE OF CASES.

<i>Bartels v. Birmingham</i> , 332 U. S. 126, 91 L. Ed. 1584, 17, 18, 19, 20	
<i>Brooks v. Winterhaven Golf Club</i> , 69 F. Supp. 399 (S. D. Florida)	8
<i>Brown v. Luster</i> , 9 Cir. 165 F. 2d 181	8, 13, 20, 21
<i>Cardillo et al. v. Mockabee</i> , 70 App. D. C. 16, 102 F. 2d 620	8
<i>Chicago, Rock Island and Pacific Railway Co. v. Bond, Administrator of Turner</i> , 240 U. S. 449, 36 S. Ct. 403, 60 L. Ed. 735	8
<i>Featherstone v. Jersey Central Power and Light Co.</i> , 3 Cir. 161 F. 2d 100	14, 16

	Page
<i>Fishgold v. Sullivan Drydock and Repair Corp.</i> , 328	
U. S. 275, 90 L. Ed. 1230, 167 A. L. R. 110....	14, 16, 21
<i>Frank v. Tru-Vue, Inc.</i> , 65 F. Supp. 220 (D. C., S. D.	
Illinois, N. D. 1946)	8
<i>Kay v. General Cable Corporation</i> , 3 Cir. 144 F. 2d 653,	
	8, 14, 16
<i>McMillan v. Montecito Country Club</i> , 65 F. Supp. 240	
(D. C. S. D. Cal. C. D. 1946)	8
<i>Metcalf and Eddy v. Mitchell</i> , 269 U. S. 514, 46 S. Ct.	
172, 70 L. Ed. 384	8
<i>National Labor Relations Board v. Hearst Publica-</i>	
<i>tions</i> , 322 U. S. 111, 88 L. Ed. 1170.....	17, 18
<i>Standard Oil Company v. Anderson</i> , 212 U. S. 215, 29	
S. Ct. 252, 53 L. Ed. 480	8
<i>United States v. Silk</i> , 331 U. S. 704, 91 L. Ed. 1335, 67	
S. Ct. 1463 (1947)	8, 17, 18, 19

STATUTES.

Selective Training and Service Act of 1940, as amend-	
ed, 54 Stat. 890, 50 U. S. C. A. App. 308..	7, 8, 13, 14, 16
Tax Code for the State of Virginia, Section 171(a)...	6

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 9667.

HARRY L. ROSENBAUM, *Appellant*,

v.

CECO STEEL PRODUCTS CORPORATION,
A Corporation, *Appellee*.

BRIEF FOR APPELLEE.

COUNTERSTATEMENT OF CASE.

For convenience all references herein to the Appendix are intended to apply to the joint Appendix contained in Appellant's brief.

There are two contracts involved in this case. Under the terms of the first, dated March 27, 1936, Appellant, under the name and style of Roanoke Engineering Sales Co., was appointed to act as the exclusive representative for Appellee to solicit orders for certain steel products of the Appellee, consisting principally of round bars and angle joists, through agents appointed by Appellant with Ap-

pellee's approval. The territory embraced all of Virginia except certain enumerated counties, and the states of North and South Carolina. Appellant was to be paid an overriding commission of five (5%) per cent on the net amount, after transportation charges and agent's commissions had been deducted, on sales of such products sold by Appellee on orders obtained by the agent. (App. 87-88) This contract might be cancelled by either party upon thirty (30) days notice, and if Appellee cancelled it was required to cancel, at the same time, all agencies created for Appellee by the Appellant, and Appellee could not renew any agreement with the agent for a period of not less than nine (9) months from the date of cancellation (App. 88). If Appellant cancelled, Appellee had the right to continue such agents without further commission to Appellant (App. 88).

The second contract, which is in the form of a letter dated September 8, 1938, addressed by Appellee to Appellant, was accepted and signed by the latter on September 24, 1938, under the name and style of Roanoke Engineering Sales Co. (App. 90-91-92). It covered principally windows and doors and, like the first contract, provided for an overriding commission to Appellant of five (5%) per cent on sales made by Appellant's agents in the territory set out in the contract. This contract also provided for cancellation on thirty (30) days notice, by either party, and if Appellee cancelled it was required simultaneously to cancel with Appellant's agents or dealers (App. 91). Under this contract Appellant was to assume full responsibility for all field erection and to contract for same in Appellant's name (App. 91-92). Appellant by letter dated September 10, 1938, to Appellee's Vice-President, disputed the territory to be covered by the contract and also suggested his wording on the cancellation provision, and raised the question as to field erection (App. 52-53-54).

In 1936, at the time of the signing of the first contract, Appellant was District Manager for three other companies (App. 33, 46), two of which Appellant testified that he still

represented as District Manager at the time of the trial below (App. 47). Appellant trades as Roanoke Engineering Sales Co. and he is the sole proprietor of this company, which is not a corporation (App. 45). During the time that Appellant was Sales Representative for Appellee, he also represented five other companies (App. 47).

It was at Appellant's insistence that Appellee was required to cancel the agency contracts simultaneously with any cancellation by Appellee of Appellant's contract (App. 49, 53-54).

Before entering into the second contract of September 24, 1938, Appellant and a representative of Appellee had certain preliminary written negotiations in which it was declared to be the intent of the parties that the relationship between Appellant and Appellee was that of independent contractor rather than an employee of Appellant (App. 49-50-51).

The negotiations covering the second or window contract covered a period from July to October, 1938 (App. 51). Questions arose covering payment of split commissions and to whom the profits should go on the erection work (App. 51, 79-80), also the territory to be covered, particularly Stafford County in Virginia (App. 52, 79).

During May, 1939, Appellee requested the elimination of West Virginia and Tennessee from the second or window contract, but Appellant refused to eliminate these two states (App. 54, 80-81).

In October, 1940, before Pearl Harbor, Appellee had suggested cancellation of both contracts because of insufficient sales volume, excessive costs and the possibility of Appellee opening a branch office (App. 54-55, 81-82).

Appellant on February 14, 1941, agreed to the elimination of West Virginia and certain portions of Tennessee (App. 82).

In April, 1942, Appellant objected to any revisions, by Appellee, in the commissions being paid to Appellant (App. 56-57-58).

Appellant testified that no sales quotas were imposed upon him by Appellee; that he planned his own work and his routes and itineraries, not only for Appellee, but for other companies he represented. Appellant's stationery did not have "District Manager", but "Sales Representative" on it; that he did not know how many times he had visited Appellee's office, but such visits were on a voluntary basis and he paid his own expenses; that he never attended any sales meeting of Appellee (App. 58-59-60).

EVIDENCE ON BEHALF OF APPELLEE.

ELMER T. GUSTAFSON testified, in addition to the narrative statement of his testimony on page five of Appellant's brief, that Appellee's District of Columbia office handles all of Appellee's products, and the sales of such products, and that these products embraced all of the items covered by the two contracts with Appellant, plus some additional ones; that his work is subject to the direction of Appellee's Sales Manager and that witness is required to attend Appellee's sales meetings (App. 60-61); that witness is paid a stipulated monthly salary, plus a bonus based on percentage of earnings and not based on sales made (App. 62-63).

NED A. OCHILTREE testified in addition to the narrative statement of his testimony, on pages five to seven of Appellant's brief, that the postwar plans of Appellee company, which were formulated in 1943, included a decision to build a plant at Hillside, New Jersey; to build a fabricating warehouse plant in Baltimore, Maryland; to open a branch office in Washington, and to open a branch in Jacksonville, Florida, and in that manner to cover the entire eastern seaboard (App. 67); also to add to the capacity of the Birmingham plant, where it was planned to manufacture steel joists which Appellee had not done before the war (App. 67). He further testified that all of these plans, with the exception of the Baltimore plant, had been accomplished by 1945, and the property had been acquired and plans drawn for the erection of the Baltimore plant, and that the reten-

tion of Appellant as a Sales Representative did not fit in with these plans for the reason that the Washington office was set up to cover the territory which Appellant and his sales organization of agents previously covered, and, in addition, Appellant handled only a part of Appellee's products, and the company was getting only partial coverage, and the Washington office handles all of Appellee's products (App. 67-68). He further testified that the territory which is covered by the Washington office embraces the territory previously included in Appellant's contract (App. 68); that the Washington office is manned by Appellee's employees and that the Appellee pays all expenses thereof, including a monthly salary to the Manager and a contingent compensation based upon net profits of the Manager's territory. Each branch office, including Washington, has a sales quota (App. 69-70); that Appellant when he was acting as Sales Representative had no such quota, and the Appellee company does not have in its organization any position similar to the one occupied by Appellant, and that it would not be possible under Appellee's present organizational set up to have Appellant act as Sales Representative, nor was it possible under such set up to have a Sales Representative to act only on a part-time basis, and handle only a portion of Appellee's products (App. 70); that Appellee did not control or attempt to control the hours and time of work that Appellant put in for the Company, and that the Appellee had the right to refuse business or refuse to make an agency contract which Appellant might recommend; that Appellant determined his hours and plan of work, and method of salesmanship and all orders were solicited on open account and the credit of the purchaser must be acceptable to Appellee's Credit Department; that Appellant was not required to visit Appellee's headquarters nor to attend regular sales meetings which were had from time to time, and any visit made by Appellant was on a voluntary basis (App. 71-72-73).

On cross examination this witness testified that the post-war plans of Appellee contemplated a very considerable ex-

pansion of manufacturing facilities and in turn an expansion of Appellee's sales program (App. 74); that Appellant represented Appellee only a part of the time, because he represented several other manufacturers of other products, and Appellee received only part of Appellant's time and the latter had only part of the company's line, and Appellee's own salaried employees sell Appellee's complete line, and the company has all of their services; that there is a substantial difference in the way Appellee does business in the territory now from the manner in which it was done when Appellant was there; through Appellee's branch offices the company has decentralized its sales force and this will give a much closer job of sales promotion and development and contact with the trade generally than Appellant could possibly do (App. 74-75); that Appellee has paid salesmen who go out from the Washington office and cover the territory theretofore covered by Appellant (App. 78-79).

There was filed in the Court below, prior to the time of trial, a stipulation signed by counsel for the respective parties, admitting certain facts as true (App. 96-97-98-99).

STATUTE INVOLVED.

As part of Appellee's case the Court below took judicial notice of The Tax Code for the State of Virginia, Section 171(a) (App. 84), the relevant part of which reads as follows:

"Every wholesale merchandise broker dealing in food products and other commodities, who sells only to wholesalers or manufacturers, and whose gross profits are measured principally by commissions, shall annually pay the privilege of doing such business a license tax of \$50.00, provided the gross commissions and gross profits of such wholesale merchandise broker for the preceding year did not exceed \$1,000.00 * * * this section shall apply to persons, firms and corporations".

SUMMARY OF ARGUMENT.

I.

The Relationship of Employer and Employee Does Not Obtain in This Case Nor Was Appellant a Person in the Employ of Appellee, But His Contractual Status With Appellee Was That of an Independent Contractor, and as Such Appellant is Without the Scope of the Provisions of Section 308 of the Selective Training and Service Act of 1940, as Amended. (54 Stat. 890, 50 U. S. C. A. App. 308)

- (a) Parties dealt at arms length in negotiating contracts, and not on any basis of creating an employer-employee relationship.
- (b) Parties did not intend to, nor did they, enter into an employer-employee relationship, and as a matter of economic reality, Appellant was not dependent upon the business of Appellee to which he rendered service.
- (c) Appellee did not control or have the right to control Appellant's work, or the manner in which it should be done, and Appellant was responsible to Appellee only as to the results obtained.

II.

Even If It Be Assumed That Appellant Was An Employee, Appellee's Circumstances Have so Changed as to Make It Unreasonable to Require Appellant's Reinstatement as Such Employee.

III.

A Liberal Construction of the Selective Training and Service Act Does Not Justify a Distortion of Its Provisions So as to Embrace Relationships Far Removed From the Concept of Employment.

ARGUMENT.

- I. The Relationship of Employer and Employee Does Not Obtain in This Case Nor Was Appellant a Person in the Employ of Appellee, But His Contractual Status With Appellee Was That of an Independent Contractor, and as Such Appellant is Without the Scope of the Provisions of Section 308 of the Selective Training and Service Act of 1940, as Amended. (54 Stat. 890, 50 U. S. C. A. App. 308.)**

The Court below found that the contractual status of Appellant was that of an independent contractor, and that Appellant was not in the employ of Appellee (App. 101). No case has been found by counsel for Appellee holding that an independent contractor is entitled to relief under the Act, nor has counsel for Appellant cited any such decision. To the contrary, the decisions in both the District and Circuit Courts are unanimous in their holding that independent contractors are without the scope of the Act.¹

In early decisions and very recently the Federal Courts have given expression to the most important elements tending to establish the relationship of an independent contractor.²

In the determination of Appellant's status, it is the total situation that is controlling,³ so that a more extensive reference to the proceedings below, than otherwise might be countenanced, will be used to show that the findings and conclusions of the Trial Court were amply justified by the testimony and exhibits in this case.

¹ *Frank v. Tru-Vue, Inc.*, 65 F. Supp. 220 (D. C., S. D. Illinois, N. D. 1946); *McMillan v. Montecito Country Club*, 65 F. Supp. 240 (D. C., S. D. Cal. C. D. 1946); *Kay v. General Cable Corporation*, 3 Cir 144 F. 2d, 653; *Brown v. Luster*, 9 Cir. 165 F. 2d, 181; *Brooks v. Winterhaven Golf Club*, 69 F. Supp. 399 (S. D. Florida).

² *Chicago, Rock Island and Pacific Railway Co. v. Bond, Administrator of Turner*, 240 U. S. 449, 36 S. Ct. 403, 60 L. Ed. 735; *Metcalf and Eddy v. Mitchell*, 269 U. S. 514, 46 S. Ct. 172, 70 L. Ed. 384; *Standard Oil Company v. Anderson*, 212 U. S. 215, 29 S. Ct. 252, 53 L. Ed. 480; *Cardillo et al. v. Mockabee*, 70 App. D. C. 16, 102 F. 2d, 620.

³ *United States v. Silk*, 91 L. Ed. 1335, 1345, 67 S. Ct. 1463 (1947).

- (a) Parties dealt at arms length in negotiating contracts, and not on any basis of creating an employer-employee relationship.

Two contracts are involved in this case. Thus we are confronted at the outset with a situation that does not generally prevail in an ordinary employer-employee relationship. It would seem that if the parties intended to create this conventional relationship, one contract would have sufficed.

Under the terms of the first contract dated March 27, 1936, Appellant under the name and style of Roanoke Engineering Sales Co. was appointed to act as the exclusive representative for Appellee to solicit orders for certain steel products of the Appellee within a specified territory (App. 87-88). The second contract, similar but not identical to the first, covered windows and doors and was accepted and signed by Appellant under the same trade name on September 24, 1938 (App. 92).

In the negotiations pertaining to these contracts, the parties dealt at arms length and they were consummated only after extended negotiations as to terms and territory (App. 51).

Prior to 1936, Appellant had been engaged in the business of manufacturers' representative for a period of ten or fifteen years (App. 34). Each contract provided that if Appellee cancelled the contract, it must at the same time cancel the contract with the sub-agents recommended by Appellant, and it was at Appellant's insistence that the contracts so provided (App. 49, 53-54), for the reason, as stated by Appellant (App. 54) that he had been let out by another company after he had done a good job in getting the manufacturer established through agents and dealers. The negotiations covering the second or window contract covered a period from July to October, 1938 (App. 51). Questions arose concerning the payment of split commissions and to whom the profit should go on the erection work (App. 51, 79), also the territory embraced in the contract, particularly Stafford County in Virginia (App. 52, 79).

- (b) Parties did not intend to, nor did they, enter into an employer-employee relationship, and as a matter of economic reality, Appellant was not dependent upon the business of Appellee to which he rendered service.

It is significant to note that the parties, before executing the second contract, entered into a written memorandum setting forth their understanding of the terms (App. 50). This memorandum states among other things (App. 51),

“It is therefore the intent of the parties that Ceco (Appellee) shall not be liable for any acts of the manager (Rosenbaum) or the agents and that the relationship of said manager and agents to Ceco is that of, in effect, independent contractors, rather than employees of Ceco.”

Thus it is apparent the parties intended the relationship to be that of an independent contractor rather than that of employer-employee.

When consideration is given to the nature of Appellant's business, it can readily be understood why he was anxious to create, preserve and maintain his status of an independent contractor.

In the first place, Appellant was a manufacturers' representative doing business under his own name and as Roanoke Engineering Sales Co. (App. 45). He had been so engaged since 1920 (App. 33). In one or the other capacity he represented at least eight other companies in addition to Appellee (App. 33, 46-47). His relationship with three of these companies is described by Appellant as “District Manager” (App. 46), and at the time of the trial below, he was then representing two of these companies in the capacity of “District Manager” (App. 47). He employed one secretary and twelve other persons on his regular payroll and as many as twenty-five “extras” (App. 45-46). He regularly paid from his own resources to the State of Virginia, at all times herein mentioned, the wholesale merchandise brokers' license tax on commissions received from Appellee (App. 98).

When a question arose concerning a revision in the commission rate, Appellant wrote a letter on April 3, 1942 to Appellee as follows (App. 56):

"Dear Ned:

"I do not want to appear to be arbitrary and, therefore, feel that an explanation of my attitude concerning revised commissions is in order.

"It costs us $2\frac{1}{2}$ per cent before we open our doors to do business. The State of Virginia charges a whole-sale brokers license tax of one per cent. The City of Roanoke charges approximately half of this amount. We carry every conceivable type of insurance—workman's compensation, public liability, property damage, social security, etc., which involves about one-half of one per cent.

"Now it may seem ridiculous to hear us say that this 2 per cent on our gross volume of business is what we pay, but nevertheless that is the case. Bear in mind that we have not mentioned income tax, or any other costs. Nor have we taken into consideration, in telling you the story, that we have to pay rent, warehouse, operate automobiles, and have a fixed overhead that is not hay.

"And so you see, my friend, that we don't break even on a $2\frac{1}{2}$ per cent commission basis. You sit in Chicago and think that the fellow in our shoes has an easy time. And we don't blame you. But now that you know the story, please pass it on to your associates and if you want any more information we will be very glad to answer your questions."

The tone and content of the foregoing letter is manifestly inconsistent with any idea of an employer-employee status. Appellant was carrying on a business in which he had assumed the full economic responsibility for the maintenance of his office and organization (App. 56, 98), and was unwilling to reduce the commission which he had theretofore been receiving from Appellee. In this connection, it is worthy of note that the Appellee did not any any time pay

any old age benefit or unemployment compensation tax on the commissions paid to Appellant, nor were employee contribution deductions made from such commissions under any Social Security Law or Unemployment Compensation Act (App. 98). It is also significant that Appellant insisted that in those instances where the purchaser of Appellee's products desired the products installed in place, that he be allowed to realize the profit from such installation (App. 80). The contract or arrangements for such erection was entered into between the purchaser and Appellant and the latter hired persons to make such installation, paid their wages, deducted Federal old age benefit tax from, and carried workman's compensation and unemployment compensation tax coverage on such persons (App. 98). Here again, is another evidence that Appellant was carrying on an independent business and was representing Appellee only incidentally.

- (c) Appellee did not control or have the right to control Appellant's work, or the manner in which it should be done, and Appellant was responsible to Appellee only as to the results obtained.**

When testifying below the Appellant stated that no sales quotas were imposed upon him by Appellee, and that he planned his own work and his routes and itineraries not only for the Appellee, but also for the other companies he represented; that he did not know how many times he had visited Appellee's office, but he paid his own expenses and it was on a voluntary basis when he went to the headquarters of Appellee, and that he never had attended any sales meetings of the company (App. 58-59-60). This testimony coincided with that of Ned A. Ochiltree for the Appellee, who testified that the company did not control or attempt to control the hours and time of work that Appellant put in for the company and that the company had the right to refuse business or refuse to make an agency contract which Appellant might recommend. Appellant determined

his hours and plan of work and method of salesmanship, and Appellant was not required to visit the company's headquarters, nor to attend regular sales meetings which were held from time to time, and any visits made by Appellant were on a voluntary basis (App. 71-72-73).

Appellant errs when he contends that Appellee had the right to discharge Appellant at any time. The relationship could only be terminated on thirty (30) days notice, and Appellee under the first contract, if it cancelled, was required to cancel all agency contracts and could not renew the same for nine months (App. 88), and under the second contract Appellee was required to cancel permanently with the agents (App. 91). Such a termination would not constitute the mere ending of the employment of an individual, but would sever Appellee's connection with the entire sales organization of Appellant in the southeastern territory. Furthermore the mere fact that the contracts were subject to termination does not constitute an employer-employee relationship between the parties.⁴

II. Even if It be Assumed That Appellant Was an Employee, Appellee's Circumstances Have So Changed as to Make It Unreasonable to Require Appellant's Reinstatement as Such Employee.

Without waiving its position that Appellant was not a person in the employ of Appellee within the scope of the Selective Service and Training Act of 1940, as Amended, Appellee maintains, and the Trial Court so found,⁵ that it ought not be required to reinstate Appellant, for the rea-

⁴ "Though the right to terminate the relationship between the parties is a circumstance that may be considered in an applicable case, still it is never a controlling factor. It must be remembered that such mutual right to terminate a contract exists in the relationship between an independent contractor and his principal. A principal who is interested primarily in the sale of his product has an interest in the ability of the independent contractor to sell his goods, which is reflected by the amount of sales, and he would naturally terminate the contract if the results were not beneficial to him. But that fact would not change the status of the relationship of principal and independent contractor existing between them when all the other factors lead to that conclusion." *Brown v. Luster, supra*, 185.

⁵ (App. 101, 107-108-109.)

son that Appellee's circumstances have so changed as to make it unreasonable for it to reinstate Appellant, and under Section 8(b) (B) of the Act, Appellee is not obliged to do so.

The Courts all agree that Congress did not intend to force employers to take on unneeded employees. Unless there is a need for the employee seeking reinstatement, or unless there is a substitute employee performing the duties once performed by the veteran, the Courts will not require the employer to reinstate the veteran.⁶ This ruling is inherent in *Fishgold v. Sullivan Drydock and Repair Corporation*, 328 U. S. 275, 90 L. Ed. 1230, 167 A. L. R. 110, where the question of super seniority arose. It follows from the Court's decision in that case that there must be a need for the veteran's services, otherwise the Court would have been content to order reinstatement of the veteran along with the other employees whose seniority was greater.

In the case at bar, the contracts with Appellant were unique, as the company never had any such similar contracts with anyone else. It operated through branch offices manned by the company's salaried personnel. (App. 65).

The testimony in this case is undisputed that long before Pearl Harbor, in October, 1940, Appellee had under consideration the question of cancelling both contracts with Appellant and establishing a branch office for the direct distribution of its products. Again in July, 1942, Appellee wrote notifying Appellant of its intention to cancel the contracts (App. 83).

The testimony of Ned A. Ochiltree, Appellee's Executive Vice-President, was undisputed that in 1943 certain post-war plans of the company had been formulated. These included, among other things, the opening of a branch office in Washington, D. C. to handle all of the company's products in the territory previously covered by Appellant, who handled only a part of such products (App. 66-67-68). Op-

⁶ *Kay v. General Cable Corporation*, *supra*; *Featherstone v. Jersey Central Power and Light Co.*, 3 Cir. 161 F. 2d, 1000.

erations in the Washington branch office had been conducted since the middle part of 1943, at first from two local hotels, because of inability to locate an office, (App. 107) and more recently from an office where there are five employees and a District Manager, all the expenses of which, including salaries, are paid by Appellee. These postwar plans also contemplated a very considerable expansion of manufacturing facilities and in turn an expansion of Appellee's sales program (App. 74). This witness further testified that there is a substantial difference in the present way of doing business in the territory in question from the manner in which it was done when Appellant was there. The latter represented the company only a part of the time because he represented several other manufacturers of other products, and Appellee received only part of Appellant's time, and the latter had only a part of the company's line, as contrasted to Appellee's own salaried employees who sell the company's complete line, and the company has all of their services. It is significant to note at this point, that paid salesmen whose headquarters are in the Washington office cover the territory previously covered by Appellant (App. 79).

It will be recalled that the company was dissatisfied with the amount of business which Appellant had obtained (App. 81), and it is quite understandable therefore that in formulating its postwar plans, the company would take steps to increase its sales volume. This the company proposed to do by the establishment of branch offices. It decentralized its sales force so as to furnish a much closer job of sales promotion and development and contact with the trade, and it manned these offices, including the Washington office, which served the territory previously served by Appellant, with its own salaried personnel (App. 79).

Mr. Ochiltree further testified that the company does not have in its organization any position similar to the one

occupied by Appellant and that it would not be possible under Appellee's present organizational set-up, to have Appellant act as a sales representative on a part-time basis, handling only a portion of Appellee's products (App. 70). It is apparent from the foregoing that there is not now, nor has there been since Appellant entered military service, anyone whose relationship to Appellee is similar to that previously existing between the parties. No one has been hired to take his place, and to order Appellant's reinstatement would be tantamount to requiring Appellee to change its organizational set up and methods of sale and distribution and no such burden is imposed under the Act involved in this case.⁷

III. A Liberal Construction of the Selective Training and Service Act Does Not Justify a Distortion of Its Provisions So as to Embrace Relationships Far Removed From the Concept of Employment.

Appellant argues that the statute should be liberally construed. Even if it be conceded that liberal construction is proper to accomplish the purposes of the Act, that does not mean that the language of the statute or the facts in existing relationship may be distorted to bring within its terms situations and persons, outside of the scope of the statute.

One of the cases cited by appellant at page 11 of its brief is *Fishgold v. Sullivan Drydock*, supra. In that case it was contended that the veteran had a superior right to be retained in service over another employee with a higher shop seniority, although the latter was preferred under the terms of the collective bargaining agreement. The veteran was laid off for nine days, when the non-veterans were given work. It was strongly argued, as here, that the statute was to be liberally construed, and the Court recognized that general principle, but nevertheless held that the construction urged by petitioner was untenable.

⁷ *Kay v. General Cable Corporation*; *Featherstone v. Jersey Central Power and Light Company*, supra.

In the paragraph immediately following the excerpt quoted in appellant's brief, the Supreme Court pointed out that the requirements that the veteran be restored to his former position or to a "position of like seniority" did not require him to be given something which he would not have had if he had not gone into the armed forces. Such a construction would have required a distortion of the language of the statute, as the Court said:

"But we would distort the language of these provisions if we read it as granting the veteran an increase in seniority over what he would have had if he had never entered the armed forces."

The decision of the Circuit Court of Appeals for the Second Circuit, reversing the judgment of the District Court for the Southern District of New York, was accordingly affirmed.

That case clearly shows that although the construction of a statute may be liberal, it cannot be extended beyond the ordinary meaning of the language used. The argument of Appellant goes far beyond the language of the statute and under the general argument that the words "in the employ" should be given a broader meaning than has heretofore been applied to them, seeks to include a relationship never regarded as constituting employment.

In support of his argument Appellant cites *National Labor Relations Board v. Hearst Publications*, 322 U. S. 111, 120-122, 88 L Ed 1170; *United States v. Silk* (including also the *Greyvan* case) 331 U. S. 704, 91 L Ed 1757; and *Bartels v. Birmingham*, 332 U. S. 126, 91 L Ed 1947. We shall review these cases in the order named.

In *National Labor Relations Board v. Hearst Publications*, *supra*, the question was whether newsboys had the right to bargain collectively. The relation was clearly one of economic dependence, even though the exact amount of loss or gain of a newsboy might be dependent upon his own efforts and initiative. All of the persons in the group

occupied the same identical relationship. Therefore, the Court held the group had a right to bargain collectively with the newspaper publisher upon which it was economically dependent.

The last two cases cited arose under the Social Security Act. In the *Silk* case the Supreme Court unanimously held that unloaders of coal from cars into bins paid upon a rate-per-ton basis were employees, although the relationship was not necessarily permanent and they furnished their own tools. The lower courts had held them to be independent contractors. The Supreme Court reversed, pointing out the limited opportunity for gain or loss and that their whole compensation depended upon their own efforts. Furthermore, "Silk was in a position to exercise all necessary supervision over their simple tasks" (ibid 1344.)

In the other cases decided at the same time, there were two groups of truck owners. Silk had contracts with the truck owners to deliver coal at an agreed price per ton. The drivers-owners paid all expenses, furnished all equipment, and employed such extra help as was necessary. They were given only general instructions as to the result to be accomplished. They had the right and did in fact haul for others if they saw fit. Silk assumed responsibility for damages to third persons. In affirming the decision of the courts below that these drivers-owners were independent contractors, the Court emphasized the fact that they were "small businessmen" with "responsibility for investment and management". The Court also pointed out the opportunity to work for others in the *Silk* case was not present in the *Greyvan* case. The driver-owners who worked for Greyvan were required to paint the name of that carrier on their trucks and to haul exclusively for that company. In spite of the fact that they were more closely integrated with the company than the driver-owners who worked for Silk, they were also held to be independent operators.

The Supreme Court said at p. 1344:

"But we agree with the decisions below in *Silk* and *Greyvan* that where the arrangements leave the driver-owner so much responsibility for investment and management as here they must be held to be independent contractors. These driver-owners are small businessmen. They own their own trucks. They hire their own helpers. In one instance they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity of profit from sound management, that marks these driver-owners as independent contractors."

When one analyzes the facts in these cases and compares the situation of the unloaders who were held to be employees and the driver-owners who were held to be independent contractors, the distinction of outstanding importance is the larger investment of the driver-owners and the greater opportunity for gain or loss. In other words, the distinction lies in the economic dependence or independence of the group involved.

In *Bartels v. Birmingham*, *supra*, the facts have an even greater analogy and application to the case under consideration. In those cases operators of public dance halls had brought suits to recover social security taxes paid in respect of members of a band furnishing music for the dancers. The arrangements of the operators were made through the bandleader who agreed to furnish a "name band" for limited engagements at the establishment, sometimes limited to a single night. The contracts between the operators and the bandleader provided in turn for the complete control and supervision by the operator. In fact, such control was exercised by the bandleader and not by the operator. One question was what weight should be given to the contract provision of right to control. The decision of the Court was based upon the facts and not the provisions of the contract.

The real question in the case did not concern the members of the band who were recognized as being employees. The question was: Who was the employer, the operator of the dance hall or the bandleader? In concluding that the bandleader was the employer of the members of the band, the Court pointed out that he was the person who selected the members, assumed the responsibility for the band's success and had the greatest opportunity for loss or gain. In other words, the bandleader was an independent contractor and the members of the band were his employees.

The reasoning of this case may be applied directly to the facts herein. Rosenbaum had a large number of employees to whom he stood in the relation of employer. He had the greatest opportunity for gain or loss. Any approval of the subagents of Rosebaum by Appellee was nominal only and of no real importance. If Rosenbaum were held to be an employee of Appellant, an even more difficult problem would be raised as to the relationship of the employees of Rosenbaum with Appellee. If the original decision in *Bartels v. Birmingham* by the United States Circuit Court of Appeals for the Eighth Circuit in 157 F. 2d 295 had been sustained, it would have tended to support Appellant's argument, but the reversal of that decision by the Supreme Court shows such argument to be unsound.

Brown v. Luster, supra, is a case that goes much further than necessary herein. Brown had sold furniture upon commission in a specific area outside of Los Angeles. While he was in the armed services, Luster turned over the territory to one Ben Harris. Luster was unwilling to restore Brown to his old territory. In the meantime, he obtained employment elsewhere as the general manager of Los Angeles Chair Company. The Court held that Brown was an independent contractor and not within the purview of the statute. In response to the argument that the statute should be liberally construed, the Court said (p. 184):

"It is clear, too, that though the legislation in question is to be liberally construed for the benefit of the vet-

eran, it aims to apply its provisions to the existing relationship before induction and not to impose upon one person a liability towards another to whom there was no previous liability. Cf. *Fishgold v. Sullivan Drydock and Repair Corporation, supra.* * * * *

“Whether we are dealing with cases involving the responsibility of a person for the acts of those under his control or with remedial or regulatory statutes, the basic distinctions between an employee and an independent contractor are the same.”

Analysis of the cases cited by Appellant, as well as *Brown v. Luster, supra*, clearly establishes that liberal construction of the statute does not warrant relief in this case. The relationship between the parties was that of an independent contractor and that relationship is not to be changed or altered by distortion of the language of the statute, under the guise of liberal construction.

CONCLUSION.

Appellee submits that Appellant was clearly an independent contractor but that even if it be assumed that he was a person in the employ of Appellee, the latter's circumstances have so changed as to make it unreasonable to require Appellant's reinstatement as such employee, and that the judgment appealed from was, in all respects, right and should be affirmed.

Respectfully submitted,

JOHN J. CARMODY,
ROGER J. WHITEFORD,
Attorneys for Appellee.